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Supreme Court, U.S.
FILED
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CLERK

No. 97-5737

In The

Supreme Court of the United States

October Term, 1997

SANDRA K. FORNEY,

Petitioner,

vs.

KENNETH S. APFEL, Commissioner,
Social Security Administration,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

JOINT APPENDIX

RALPH WILBORN*
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Petition For Certiorari Filed August 25, 1997
Certiorari Granted January 16, 1998

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RELEVANT DOCKET ENTRIES

I. United States District Court for the District of Oregon No. CV 94-6357-JO

5/1/95	9	OPINION AND ORDER DENYING REMANDING CASE to the Secretary for further proceedings [1] Signed 4/28/95 by Honorable Robert E. Jones microfilmed 5/2/95 (counsel notified) (tely) [Entry date 05/02/95]
5/24/95	10	JUDGMENT it is ORDERED AND ADJUDGED this case is REMANDED to the Secretary for further proceedings Signed 5/24/95 microfilmed 5/25/95 Honorable Robert E. Jones (cc: Counsel notified) (pegs) [Entry date 05/25/95]

II. United States Court of Appeals for the Ninth Circuit No. 95-35560

10/21/96	Filed PROMO order (Deputy Clerk: gb) In addition to their other arguments, the parties should be prepared to address at oral argument the question whether the decision of the dc is sufficiently final to give this court jurisdiction over the appeal * * * CITE * * * [95-35560] (sf)
3/4/97	FILED OPINION: DISMISSED (Terminated on the merits after Oral Hearing; Dismissed/Frivolous; Written, Signed, Published. William C. CANBY, author; Pamela A. RYMER; Andrew J. KLEINFELD.) FILED AND ENTERED JUDGMENT. [95-35560] (gail)
6/6/97	MANDATE ISSUED [95-35560] (gail)

EXHIBIT 1

APPLICATION FOR DISABILITY
INSURANCE BENEFITS

(Filed 11/18/91)

I APPLY FOR A PERIOD OF DISABILITY AND/OR ALL INSURANCE BENEFITS FOR WHICH I AM ELIGIBLE UNDER TITLE II AND PART A OF TITLE XVIII OF THE SOCIAL SECURITY ACT, AS PRESENTLY AMENDED.

MY NAME IS SANDRA K. FORNEY.

MY NAME AT BIRTH WAS SANDRA K. GREGSON.

MY SOCIAL SECURITY NUMBER IS 546-66-9538.

MY DATE OF BIRTH IS AUGUST 01, 1946.

I BECAME UNABLE TO WORK BECAUSE OF MY DISABLING CONDITION ON JUNE 07, 1991.

I AM STILL DISABLED.

NO PREVIOUS APPLICATION HAS BEEN FILED WITH THE SOCIAL SECURITY ADMINISTRATION BY OR FOR ME.

I HAVE NOT FILED NOR DO I INTEND TO FILE FOR ANY WORKERS' COMPENSATION, PUBLIC DISABILITY OR BLACK LUNG BENEFITS.

I AM NOT ENTITLED TO NOR DO I EXPECT TO BECOME ENTITLED TO A PENSION OR ANNUITY BASED IN WHOLE OR IN PART ON WORK AFTER 1956 NOT COVERED BY SOCIAL SECURITY.

THE SOCIAL SECURITY ADMINISTRATION AND THE STATE AGENCY REVIEWING MY CLAIM DOES HAVE MY PERMISSION TO CONTACT MY EMPLOYER(S).

I AM MARRIED TO LEON FORNEY, WE WERE MARRIED ON AUGUST 23, 1962 IN RENO NV BY A CLERGYMAN OR PUBLIC OFFICIAL. MY SPOUSE'S AGE OR BIRTHDATE IS, JANUARY 15, 1944 AND SOCIAL SECURITY NUMBER IS 572-56-8733.

I WAS NOT PREVIOUSLY MARRIED.

I DO NOT HAVE ANY CHILDREN WHO MAY BE ELIGIBLE FOR SOCIAL SECURITY BENEFITS ON THIS RECORD.

I UNDERSTAND THAT I MUST PROVIDE MEDICAL EVIDENCE ABOUT MY DISABILITY, OR ASSIST THE SOCIAL SECURITY ADMINISTRATION IN OBTAINING THE EVIDENCE.

I UNDERSTAND THAT I MAY BE REQUESTED BY THE STATE DISABILITY DETERMINATION SERVICES TO HAVE A CONSULTATIVE EXAMINATION AT THE EXPENSE OF THE SOCIAL SECURITY ADMINISTRATION AND THAT IF I DO NOT GO, MY CLAIM MAY BE DENIED.

I AUTHORIZE ANY PHYSICIAN, HOSPITAL, AGENCY, OR OTHER ORGANIZATION TO DISCLOSE ANY MEDICAL RECORD OR INFORMATION ABOUT MY DISABILITY TO THE SOCIAL SECURITY ADMINISTRATION OR TO THE STATE DISABILITY DETERMINATION SERVICES THAT MAY REVIEW MY CLAIM OR CONTINUING DISABILITY.

I AUTHORIZE THE SOCIAL SECURITY ADMINISTRATION TO RELEASE ANY INFORMATION ABOUT ME TO A PHYSICIAN OR MEDICAL FACILITY PREPARATORY TO AN EXAMINATION OR TEST. RESULTS OF

SUCH EXAMINATION OR TEST MAY BE RELEASED TO MY PHYSICIAN OR OTHER TREATING SOURCE.

I AUTHORIZE THAT INFORMATION ABOUT MY DISABILITY MAY BE FURNISHED TO ANY CONTRACTOR FOR CLERICAL SERVICES BY THE STATE DISABILITY DETERMINATION SERVICES.

I AGREE TO NOTIFY THE SOCIAL SECURITY ADMINISTRATION OF ALL EVENTS AS EXPLAINED TO ME.

I AGREE TO NOTIFY THE SOCIAL SECURITY ADMINISTRATION IF:

- MY MEDICAL CONDITION IMPROVES SO THAT I WOULD BE ABLE TO WORK, EVEN THOUGH I HAVE NOT YET RETURNED TO WORK.
- I GO TO WORK WHETHER AS AN EMPLOYEE OR A SELF-EMPLOYED PERSON.
- I APPLY FOR OR RECEIVE A DECISION ON BENEFITS UNDER ANY WORKERS' COMPENSTAION LAW OR PLAN (INCLUDING BLACK LUNG BENEFITS FROM THE DEPARTMENT OF LABOR), OR OTHER PUBLIC BENEFIT BASED ON DISABILITY.
- I AM IMPRISONED FOR CONVICTION OF A FELONY.

THE ABOVE EVENTS MAY AFFECT MY ELIGIBILITY TO DISABILITY BENEFITS AS PROVIDED IN THE SOCIAL SECURITY ACT, AS AMENDED.

I AGREE TO NOTIFY THE SOCIAL SECURITY ADMINISTRATION IF I BECOME ENTITLED TO A PENSION OR ANNUITY BASED ON EMPLOYMENT AFTER 1956 NOT COVERED BY SOCIAL SECURITY, OR IF SUCH PENSION OR ANNUITY STOPS.

MY REPORTING RESPONSIBILITIES HAVE BEEN EXPLAINED TO ME.

REMARKS:

MY EARNINGS FROM 1978 THROUGH 1990 ARE CORRECTLY POSTED. I WORKED FOR THE SAME EMPLOYER FROM 1974 THROUGH 10/91.

I KNOW THAT ANYONE WHO MAKES OR CAUSES TO BE MADE A FALSE STATEMENT OR REPRESENTATION OF MATERIAL FACT IN AN APPLICATION OR FOR USE IN DETERMINING A RIGHT TO PAYMENT UNDER THE SOCIAL SECURITY ACT COMMITS A CRIME PUNISHABLE UNDER FEDERAL LAW BY FINE, IMPRISONMENT OR BOTH. I AFFIRM THAT ALL INFORMATION I HAVE GIVEN IN CONNECTION WITH THIS CLAIM IS TRUE.

MY MAILING ADDRESS IS 61000 THE PINES
SP 572
BEND OR 97702

MY TELEPHONE NUMBER IS (503) 389-4849.

SIGNATURE /s/ Sandra K. Forney DATE 11-2-91

WITNESSES ARE REQUIRED ONLY IF THIS APPLICATION HAS BEEN SIGNED BY MARK (X) ABOVE. IF SIGNED BY (X), TWO WITNESSES TO THE SIGNING

WHO KNOW THE APPLICANT MUST SIGN BELOW, GIVING THEIR FULL ADDRESSES.

SIGNATURE OF WITNESS	SIGNATURE OF WITNESS
NUMBER AND STREET ADDRESS	NUMBER AND STREET ADDRESS
CITY, STATE AND ZIP CODE	CITY, STATE AND ZIP CODE

[LOGO]
DEPARTMENT OF HEALTH & HUMAN SERVICES
Social Security Administration

Refer to: 546-66-9538

Office of Hearings and Appeals
1102 Lincoln Street, Room 200
Eugene, OR 97401
Telephone: (503) 465-6402
Date: Apr. 18, 1994

NOTICE OF DECISION - UNFAVORABLE

Sandra K. Forney
61354 Blakley, Apt A1
Bend, OR 97702

I have made the enclosed decision in your case. Please read this notice and the decision carefully.

If You Disagree With The Decision

If you do not agree with my decision, you may file an appeal with the Appeals Council.

How To File An Appeal

To file an appeal you or your representative must request the Appeals Council to review the decision. You must make the request in writing. You may use our Request for Review form, HA-520, or write a letter.

You may file your request at any local Social Security office or a hearing office. You may also mail your

request right to the Appeals Council, Office of Hearings and Appeals, 5107 Leesburg Pike, Falls Church, VA 22041-3255. Please put the Social Security number shown above on any appeal you file.

Time To File An Appeal

To file an appeal, you must file your request for review within **60 days** from the date you get this notice.

The Appeals Council assumes you got the notice 5 days after the date shown above unless you show you did not get it within the 5-day period. The Council will dismiss a late request unless you show you had a good reason for not filing it on time.

Time To Submit New Evidence

You should submit any new evidence you wish to the Appeals Council to consider with your request for review.

How An Appeal Works

Our regulations state the rules the Appeals Council applies to decide whether to review a case and in reviewing a case. These rules appear in the Code of Federal Regulations, Title 20, Chapter III, Part 404, Subpart J.

If you file an appeal, the Council will consider all of my decision, even the parts with which you may agree. The Council will review your case if one of the reasons for

review listed in our regulation exists. Section 404.970 of the regulations lists these reasons.

Requesting review places the entire record of your case before the Council. Review can make any part of my decision fully or partially favorable or unfavorable to you.

On review, the Council may itself consider the issues and decide your case. The Council may also send it back to an Administrative Law Judge for a new decision.

The Appeals Council Can Review The Decision On Its Own Motion

The Appeals Council can review my decision even if you do not ask it to do so. If it decides to do that, the Council will mail you a notice about its review within 60 days from the date of this notice.

If No Appeal And No Review On The Appeals Council's Own Motion

If you do not appeal and the Council does not review my decision on its own motion, you will not have a right to court review. My decision will be a final decision that can be changed only under special rules.

New Application

You have the right to file a new application at any time, but filing a new application is not the same as appealing this decision. If you disagree with my decision and

you file a new application instead of appealing, you might lose some benefits, or not qualify for any benefits. My decision could also be used to deny a new application for insurance benefits, if the facts and issues are the same. So, if you disagree with this decision, you should file an appeal within 60 days.

Do You Have Any Questions?

If you have any questions, you may call, write or visit any Social Security office. If you visit an office, please bring this notice and decision with you. The telephone number of the local office that serves your area is (503) 388-6712. Its address is Branch Office, 39 Louisiana Ave., Bend, OR. 97709.

Stephen P. Kramer
Administrative Law Judge

Enclosures

cc:
Philip H. Garrow
Attorney at Law
888 NW Hill Street
Bend, OR 97701

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
Social Security Administration
OFFICE OF HEARINGS AND APPEALS

DECISION

IN THE CASE OF	**CLAIM FOR**
Sandra K. Forney (Claimant)	Period of Disability and Disability Insurance Benefits
_____ (Wage Earner)	546-66-9538 (Social Security Number)

This case is before me on an order from the Appeals Council, remanding the case for further proceedings, including a new hearing. The claimant's application for disability insurance benefits was filed on November 18, 1991. She alleged that she had been disabled since June 7, 1991, due to fibrositis. Following proper notice, a hearing was held on January 13, 1993, in Bend, Oregon, after which I issued a decision denying entitlement to benefits. The claimant, who was unrepresented at the first hearing, has now obtained counsel, Philip H. Garrow, Attorney at Law.

A supplemental hearing was held on March 15, 1994, in Bend, Oregon, at which the claimant appeared personally and testified. She was represented by her attorney. Leon Forney, the claimant's husband, testified on her behalf. Peter G. Moulton, Ph.D., testified as a medical expert. Richard C. Ridenour testified as a vocational expert.

In deciding whether or not the claimant is disabled, I must follow a step-by-step evaluation process set forth in

the regulations at 20 CFR 404.1520 and 416.920. The first step of this process asks whether or not the claimant has engaged in substantial gainful work activity since the alleged onset date of disability. The claimant has continued to be unemployed since her first hearing. Prior to that time, as noted in the previous decision, she worked as a kitchen manager, baker and cook from September 4, 1991 to October 2, 1991 and earned approximately $1600 (Exhibit 10). Under the regulation at 20 CFR 404.1574(b), I find that the claimant's work activity was an unsuccessful work attempt and not substantial gainful activity. The claimant met the insured status requirements of the Social Security Act on June 7, 1991, her alleged onset date, and she will continue to meet those requirements through December 31, 1995.

The second step in the evaluation process asks whether or not the claimant has a "severe" impairment within the meaning of the Social Security Act. An impairment is considered to be "severe" if it imposes more than a minimal restriction on an individual's capacity to perform work related activity (20 CFR 404.1521 and 416.921).

In December 1991, the claimant alleged that she was forced to stop working because of continuous pain. However, she stated that she did laundry once a week, cleaned the bathroom once a week, did the dishes once a day, made the bed once a day, and swept, mopped, and vacuumed occasionally. She also did shopping for small food items and her husband helped her with shopping once a week for larger articles. She walked up to two miles a day and did water exercises.

At the supplemental hearing, the claimant testified the every day except Sunday she does water aerobics and simple stretching exercises. Also daily, she does some housework, approximately one hour, makes one trip to the store, reads, and cooks meals although she sometimes burns pots when cooking dinner. She walks five blocks three times a week to visit her parents, and her children and grandchildren come to see her two to three times a month. Walking causes burning in her muscles, but she does not have any problems with her forearms. She described fatigue which occurs between one and two p.m., and stated that she has to lie down and rest then. She said that her doctor agrees that she cannot return to work. Her medications include amitriptyline, ibuprofen, Premarin, and Flexeril, and she does not have headaches as long as she takes ibuprofen. She testified that she could not sleep prior to the introduction of amitriptyline and Flexeril, but now sleeps between 11:00 and 7:30 a.m. She said that she feels more energetic mentally, but her concentration is still poor.

The claimant's husband testified that he used to come home and find the claimant crying. He stated that she cannot drive their pickup truck and that he goes shopping with the claimant and carries groceries.

The claimant's treating physician is Steven W. Cross, M.D. As discussed in the previous decision, he has treated the claimant since 1988, although her findings were minimal at that time. On July 26, 1991, his chart notes reveal that her fibrositis and hypertension were controlled. However, on October 7, 1991, he reported that she was no longer able to work because the pain was too great for the amount of time she spent on her feet. He

continued to describe her as incapable of working as a cook or a baker through January 6, 1992, and said that she was unable to stand for more than 15 minutes at a time, walk for more than 20 minutes at a time, lift more than 15 pounds, or carry more than 15 pounds for more than 30 feet. He stated that she could "maybe" work two hours of an eight hour day. However, thereafter he reported that the claimant was walking two miles a day and doing water aerobics. She was able to sleep at night because she took Flexeril and amitriptyline. A sedimentation rate, ANA test, and a rheumatoid factor rate were all negative. On August 14, 1992, Dr. Cross' diagnosis was fibrositis, presently controlled, and he indicated that he would only need to see the claimant every three months (Exhibits 15, 19 and 21).

Additional evidence submitted by the claimant reveals that she saw Paul H. Altrocchi, M.D., for complaints of headaches, neck pain and back aches in 1985, and was prescribed short-term bed rest and Robaxin (Exhibit 31). The claimant's disability retirement was approved by the Oregon Public Employees Retirement System on February 24, 1992 (Exhibit 33).

On May 4, 1992, the claimant saw James W. Greenough, Ph.D., for a psychological assessment at the request of Disability Determination Services. She gave the impression of at least average intellectual potential, with some loss of memory and concentration abilities secondary to her preoccupation with pain. She described her mood as somewhat depressed, but less so since she has been taking antidepressant medication over the last year. The diagnoses were adjustment disorder with depression and

characteristics of a dependent personality disorder (Exhibit 16).

In September 1992, the claimant saw Terry L. Schrader, M.D., for a psychiatric evaluation, at which she reported that she had been unable to continue working as a cook/manager since October 1991. She described herself as initially in a state of denial and stated that she experienced a certain amount of depression, but was now following an active schedule pursuant to her doctor's orders. She found walking up to two miles a day, water exercise, and a jacuzzi tub to be the most helpful. She took a lot of time to do her housework, but she got it done. She slept between midnight and seven or eight a.m., and usually rested during the day. Her medications included amitriptyline, Flexeril, ibuprofen, Premarin, and an anti-hypertensive medication, and she described them as helpful, although the amitriptyline caused mild side effects such as a dry mouth. Dr. Schrader found her MMPI profile to be valid, with no evidence of a tendency to exaggerate her symptoms, and consistent with a mild depression and her diagnosis of fibrositis. The claimant believed that her pain management was better than it was a year ago, although she still had pain complaints. She stated that pain "no longer controlled her life" (Exhibit 32).

On December 6, 1993, the claimant saw Nancy L. Brennan, D.O., for a physical examination at the request of Disability Determination Services. The claimant described her two major complaints as generalized muscular pain and muscular weakness. On physical examination, Dr. Brennan noted slow gait, but no foot drop or antalgic gait, and she was able to balance herself on one

foot. She had a significant number of tender points, consistent with fibromyalgia. She had reduced range of motion of her shoulder and gross tremor of the tested extremity with exertion. Her cervical range of motion was normal; however, when she flexed her lumbar spine greater than 90 degrees, she did not have the muscle strength to pull her trunk erect and used her hands to "walk" up her thighs. Her quadriceps were unable to raise her body from a squatting position; she had difficulty rising from a low seated position; and she was unable to perform this maneuver repetitiously. Dr. Brennan opined that the claimant would be unable to sit, stand, or walk for any appreciable length of time without shifting or weight or moving about to a new position. She was sure that she would be unable to lift, carry, reach over her head, or handle objects heavier than a pound or two for any length of time. She also exhibited a lapse of concentration and some lapses in her memory (Exhibit 34, pages 1-4).

However, on a medical assessment of the claimant's ability to do work-related activities, Dr. Brennan stated that the claimant could occasionally lift 10-15 pounds, could stand/walk for a total of two to three hours in an eight hour day, 15 minutes at one time, and could sit for a total of six hours in an eight hour day, 45 minutes at one time. However, she noted that the limitations on sitting were by patient-given history, and there was no evidence of limitation on examination. She thought the claimant could occasionally climb and stoop, but never kneel, balance, crouch or crawl. She said that reaching and pushing and pulling would aggravate the claimant's trigger points. She noted that the claimant should not be around

temperature extremes or noisy environments, because external stress to the system often causes exacerbation of fibromyalgia symptoms (Exhibit 34).

Dr. Cross' chart notes reveal that he saw the claimant in March 1993 for a follow up on her blood pressure, which needed medication adjustment, and in April 1993, for a follow up on her fibrositis. In April she reported that she was feeling better on Daypro, and having less burning in her stomach. In July 1993 she revealed that she was walking two miles a day, doing water aerobics, and taking her medication. She did some housework, usually dishes, and occasionally had a day where she could clean the whole house, but then would suffer for it the next day. She was maintaining a good attitude and Dr. Cross described her fibromyalgia as chronic and stable. On October 27, 1993, Dr. Cross reported that she was still exercising, and on February 1, 1994 he stated that she was doing six days a week of water aerobics and staying active. She said that she did not want to end up like other people with the problem in wheelchairs and walking aids. At the last notation, her medications included ibuprofen, amitriptyline, Premarin, and calcium (Exhibit 37).

On February 9, 1994, the claimant received a physical capacity evaluation from Physical Therapy Associates. The claimant described morning stiffness and symptoms primarily aggravated by prolonged static posture or bending and lifting activity. Her current daily activities included minimal housework with delayed soreness, water aerobics class, and walking up to two miles per day. The claimant demonstrated significant deconditioning in her extremities and trunk for repetitive bending,

sustained stand/walk, and repetitive materials handling tolerance. The evaluator thought that the claimant was limited to part-time sedentary work; however, of the three factors considered, only one involved consideration of her "poor to fair" pain management. The other two were her deconditioning and her length of time off of work (Exhibit 38). The claimant's deconditioning for repetitive materials handling, the only portion applicable to sedentary work, was based upon her performance on timed tests which are subject to equivocal exertional efforts and possibly distorted results. Additionally, deconditioning may be related to the time lapsed since active employment. Although considered a factor for certain portions of disability assessment, such as the transferability of acquired work skills from jobs which were performed over 15 years in the past, the relatively short period of time the claimant has been unemployed would not be a factor in her evaluation for Social Security purposes. Therefore, although the claimant's limitation to sedentary or limited light work has been established and confirmed by observation and is not unusual for her diagnosis, her limitation to part-time work found by this evaluation is considered to be based upon subjective factors within the control of the individual. As will be further discussed below, I find that the claimant is prone to exaggeration of her restrictions and subjective symptomatology, and that therefore a limitation of part-time work is not reasonable under the circumstances and not supported by the other evidence of record.

At the hearing, Peter Moulton, Ph.D., testified as a medical expert. He stated that the claimant's diagnoses are fibrositis and mild dysthymia, which has been helped by

medication. He thought that she had moderate limitations on her activities of daily living and slight difficulties in maintaining social functioning, but that she often had deficiencies of concentration, persistence, or pace. He said that she was moderately limited in her ability to understand, remember and carry out detailed instructions, her ability to maintain attention and concentration for extended periods, and in her ability to perform activities within a schedule, maintain regular attendance, and be punctual within customary tolerances. He did not think that she was significantly limited in any other categories.

Upon consideration of the evidence in its entirety, I find that the record establishes a combination of severe impairments that impose more than a minimal limitation on the claimant's ability to perform basic work activities (Exhibit 25 and 20 CFR 404.1520(c), 404.1520a(c) and 404.1521). However, these impairments do not meet or equal any of the criteria of the Listing of Impairments contained in Appendix 1, Subpart P, Regulations No. 4.

The claimant's fibrositis has been evaluated under the Listings at 1.00 *et seq.* for the musculoskeletal system. Other than complaints of pain, the claimant does not have the appropriate abnormal signs or laboratory findings required to satisfy the requirements of any Listing under this section. The claimant's mental sypmtomatology does not meet or equal the requirements of any of the impairments for mental disorders, as documented in the evidence of record and confirmed by Dr. Moulton's testimony. A psychological review technique form has been prepared reflecting this determination and is attached to this decision. As disability is not established pursuant to

the criteria of 20 CFR 416.920(d), further evaluation in this claim requires an assessment of the claimant's residual functional capacity.

In assessing the claimant's residual functional capacity, consideration has been given to the claimant's testimony regarding pain and discomfort. Pain, when associated with a medically determinable impairment which could produce pain, may be of such severity as to cause an individual to be under a "disability." However, the inability of a claimant to work without some pain and discomfort does not necessarily satisfy the test for disability under the provisions of the Act. *Kroeneke v. Richardson*, 363 F.Supp. 891 (D.Or.1973); *Valdez v. Heckler*, 616 F.Supp. 933, 940 (D.C.Cal.1985).

As noted in Social Security Ruling 88-13, the related "symptoms" of pain are the individual's own perception of the effects of the physical or mental impairment. Because of the subjective characteristics of symptoms and the absence of reliable techniques for measurement, symptoms (especially pain) are difficult to prove, disprove or quantify. This ruling notes a need for a sound medical basis for the disability decision as well as consideration of the claimant's symptoms. The ruling, which is binding upon an Administrative Law Judge in the consideration of symptoms (including pain) in the evaluation of disability cases (20 CFR § 422.406(b)(1)), reiterates the policy set forth in the Social Security Regulations (20 CFR § 404.1529 and § 416.929), which provide that pain cannot be found to have a significant effect on a disability decision unless medical signs or laboratory findings show

that a medically determinable physical or mental impairment is present that reasonably could be expected to produce the pain alleged.

In determining the level and severity of pain, pertinent evidence has been considered such as: descriptions of the claimant's daily activities; frequency, amounts and effects of any medications; the claimant's appearance and credibility; any comments of physicians appearing of record; objective clinical laboratory findings, or the lack thereof; and the existence or nonexistence of any observable signs or significant pathological abnormalities associated with and resulting from severe and intense pain. If it is found that a claimant's testimony relating to the intensity of his or her pain and other limitations is unreliable, a credibility determination is to be made citing the reasons why the testimony is unpersuasive. *Bunnell v. Sullivan*, 947 F.2d 341 (9th Cir. 1991). In this regard, questions of credibility and resolutions of conflicts in the testimony are functions solely of the Secretary. *Yuckert v. Bowen*, 841 F.2d 303, 307 (9th Cir.1988); *Sample v. Schweiker*, 694 F.2d 639, 642 (9th Cir.1982); *Waters v. Gardner*, 452 F.2d 855, 858 n.7 (9th Cir.1971).

In accordance with the criteria set forth above, the record fails to document incapacitating symptomatology to the extent and degree alleged by the claimant. The record reflects significant discrepancies and/or omissions between the claimant's reports to various medical personnel and to the Agency. She alleges severe, incapacitating pain in one instance, and then, on another, states that her condition has undergone significant improvement with treatment and medication. She told Dr. Schrader that her

pain management was better than it was a year previously, and that pain no longer controlled her life, a statement which is substantially reproduced in her reports to Dr. Cross, and yet she told Dr. Brennan that her generalized muscular pain was a "10" on a scale of 1 to 10. In the latter instance, she was aware that she was undergoing a physical examination with emphasis on evidence of fibrositis and its severity.

While it is essentially uncontroverted that the claimant is incapable of returning to work as a managerial cook, work which she described as involved standing up to seven hours a day and frequently lifting up to 50 pounds (Exhibit 9), despite her allegations, the record does not establish the legitimacy of her other complaints. Even after considering her assertions of extreme pain, Dr. Brennan found that she was capable of sitting for up to six hours a day, walking or standing up to three hours a day, and occasionally lifting 10 to 15 pounds. The physical capacities evaluation likewise found that she was capable of sedentary work, and, although a further reduction to part-time work was noted, that reduction was based upon tests which are capable of distortion based upon equivocal effort, as previously discussed.

The claimant's activities are commensurate with a capacity for sedentary work, and even occasional light work. Another example of her somewhat misleading testimony is that she failed to mention at the hearing that she can occasionally clean her whole house in one day. Her list of daily activities is quite broad, and while it is noted that she does not drive, apparently the only vehicle available is a pick-up truck. She does housework, exercises, cooks, reads, and goes shopping daily. She does more extensive

activities several times a week. The record does not support a conclusion that she must lie down for a protracted period every day, and Dr. Brennan did not note such a significant disruption in her ability to perform activities during the day. Therefore, I conclude that this resting period is not medically imperative.

I do not find the claimant's testimonial reports of subjective reporting of her capacity to be the most reliable evidence of record upon which to base an assessment of her residual functional capacity. The only physician to currently render a physical capacities evaluation is Dr. Brennan, and her assessment indicates that the claimant is capable of working. Dr. Cross has not recently expressed an opinion, and subsequent to his statement that the claimant might be limited to two hours per day (with apparent reference to her work as a cook), he has repeatedly reported that her condition has improved or stabilized. Even the claimant herself acknowledges that she is capable of more activity than that encompassed by two hours per day. In fact, she does at least two hours of work per day at an exertional capacity beyond sedentary, if both her housework and her exercise routine are considered. Although the claimant stated that her doctor supports her contention that she cannot return to work, it is conceded that she cannot return to work *as a baker or a cook*. Other work is not precluded by a statement that she could not return to work she had been doing in the past.

The claimant's demeanor at the hearing was not indicative of an individual who is experiencing disabling incapacity; she did not appear to be in pain or require a period in which to rest. She was capable of attention to all questions asked, and her responses were rational,

although somewhat evasive. Her medications are very conservative, but even this conservative treatment has produced considerable relief of her symptoms. For example, she no longer has difficulty sleeping regularly, she no longer has headaches, and she has reported improvement in her musculoskeletal pain to her examining and treating physicians, in contrast to her testimony. Upon consideration of the evidence in its entirety, I find that the subjective reports of the claimant and her witness are not credibly supported by the weight of the evidentiary record to the extent alleged pursuant to the criteria of SSR 88-13.

I find that the claimant is capable of sedentary or light work within the ranges described below; however, based upon the testimony of the vocational expert at the hearing, and as previously discussed above, this precludes the performance of her past relevant work. If the claimant cannot return to her past relevant work, then the Secretary must assume the burden of showing that despite her impairments and in light of her age, education and work experience, there is still other work she can perform, which exists in significant numbers in either the claimant's regional economy or in the national economy or both.

At the hearing, Richard Ridenour testified as a vocational expert. Although he stated that the claimant could not perform her past relevant work as a head cook, a baker, or manager of a school lunch room program if she were limited to the sedentary or light exertional level, he testified that the claimant has acquired skills from that work which are transferable to other semi-skilled work. He identified these skills as involving public contact and

service to the public. The claimant is 47 years old and has the equivalent of a high school education. She was 44 years old at her alleged onset date. Given a hypothetical question limiting the claimant to work that does not involve lifting more than 15 to 20 pounds or walking more than two miles, and which allows her the ability to stand and change position at will, and also considering her vocational factors, Mr. Ridenour testified that the claimant could perform work as an order clerk and a telephone answering service operator. Given an additional hypothetical question limiting the claimant in accordance with the functional capacity assessment described by Dr. Brennan and further considering the limitations described by Dr. Moulton at the hearing, in addition to her vocational factors, Mr. Ridenour testified that she could still perform the jobs in question. Finally, given a hypothetical question based upon the physical capacity evaluation performed by Physical Therapy Associates, found in Exhibit 38, in addition to the same psychological limitations and vocational factors, Mr. Ridenour's testimony remained unchanged. As I have determined that the claimant can perform sedentary work as described on a full-time basis, she would be able to perform the jobs of order clerk and answering service operator full-time. Mr. Ridenour testified that there are over 850,000 such jobs in the national economy.

In summary, I find that the jobs delineated by the vocational expert support a conclusion that the claimant has had the ability to perform a wide range of sedentary work existing in significant numbers in the national economy during the period relevant to this adjudication. Therefore, the framework of Rules 201.21 and 201.22 of

Appendix 2, Subpart P, Regulations No. 4 directs a conclusion that she is not under a disability. Accordingly, I find that the claimant is "not disabled," as defined by the Social Security Act.

FINDINGS

After careful consideration of the entire record, the Administrative Law Judge makes the following findings:

1. The claimant met the disability insured status requirements of the Act on June 7, 1991, the date the claimant stated she became unable to work, and will continue to meet them through at least December 31, 1995.

2. The claimant has not engaged in substantial gainful activity since June 7, 1991.

3. The medical evidence establishes that the claimant has a combination of severe impairments, but that she does not have an impairment or combination of impairments listed in, or medically equal to one listed in Appendix 1, Subpart P, Regulations No. 4.

4. The claimant's testimony, and that of her husband, was not fully credible.

5. The claimant has the residual functional capacity to perform work as described in the decision above (20 CFR 404.1545).

6. The claimant is unable to perform her past relevant work as a head cook, a baker, and a manager of a school lunch room program.

7. The claimant's residual functional capacity for the full range of sedentary work is reduced by the limitations described in the decision above.

8. The claimant is 47 years old, which is defined as a younger individual (20 CFR 404.1563).

9. The claimant has the equivalent of a high school education (20 CFR 404.1564).

10. Considering the claimant's younger age, transferability of skills is not a material factor in the determination of disability; however, the claimant has acquired work skills which are transferable to other semi-skilled work, such as working with and serving the public.

11. Based on an extertional capacity for sedentary work, and the claimant's age, education, and work experience, section 404.1569 and Rules 201.21 and 201.22, Table No. 1, Appendix 2, Subpart P, Regulations No. 4 would direct a conclusion of "not disabled."

12. Although the claimant's additional nonexertional limitations do not allow her to perform the full range of sedentary work, at the hearing a vocational expert testified that there are a significant number of jobs in the national economy which she could perform. Examples of such jobs are: food and beverage order clerk and telephone answering service operator. There are over 850,000 such jobs in the national economy.

13. The claimant was not under a "disability," as defined in the Social Security Act, at any time

through the date of this decision (20 CFR 404.1520(f)).

DECISION

It is the decision of the Administrative Law Judge that, based on the application filed on November 18, 1991, the claimant is not entitled to a period of disability or disability insurance benefits under sections 216(i) and 223, respectively, of the Social Security Act.

/s/ Stephen P. Kramer
STEPHEN P. KRAMER
Administrative Law Judge

Apr. 18, 1994
Date

OHA PSYCHIATRIC REVIEW TECHNIQUE FORM

Name: Sandra K. Forney SSN: 546-66-9538

Assessment is for: Current Evaluation

Administrative Law Judge's Signature	Date
/s/ Illegible	APR 18 1994

I. MEDICAL SUMMARY

A. Medical Disposition(s): Impairment Severe But Not Expected to Last 12 Months

B. Based Upon Category(ies): 12.04

II. Reviewer's Notes (Does not apply to OHA)

III. DOCUMENTATION OF FACTORS THAT EVIDENCE THE DISORDER (Evaluation of the existence of a sign or sympton CLUSTER or SYNDROME for the Listed Disorder.)

PRESENT	ABSENT			
[ ]	[x]	A.	12.02	Organic Mental Disorders
[ ]	[x]	B.	12.03	Schizophrenic, Paranoid and other Psychotic Disorders
[x]	[ ]	C.	12.04	Affective Disorders
[ ]	[x]	D.	12.05	Mental Retardation and Autism
[ ]	[x]	E.	12.06	Anxiety Related Disorders

[ ]	[x]	F.	12.07	Somatoform Disorders
[ ]	[x]	G.	12.08	Personality Disorders
[ ]	[x]	H.	12.09	Substance Addiction Disorders

C. **12.04 Affective Disorders** – Disturbance of mood, accompanied by a full or partial manic or depressive syndrome, as evidenced by at least one of the following:

PRESENT–ABSENT–INSUFFICIENT EVIDENCE

1. [ ] [x] [ ] Depressive syndrome characterized by at least four of the following:
   - a. [ ] Anhedonia or pervasive loss of interest in almost all activities, or
   - b. [ ] Appetite disturbance with change in weight, or
   - c. [ ] Sleep disturbance, or
   - d. [ ] Psychomotor agitation or retardation, or
   - e. [ ] Decreased energy, or
   - f. [ ] Feelings of guilt or worthlessness, or
   - g. [ ] Difficulty concentrating or thinking, or
   - h. [ ] Thoughts of suicide, or
   - i. [ ] Hallucinations, delusions or paranoid thinking

2. [ ] [x] [ ] Manic syndrome characterized by at least three of the following:
   - a. [ ] Hyperactivity, or
   - b. [ ] Pressures of speech, or
   - c. [ ] Flight of ideas, or
   - d. [ ] Inflated self-esteem, or
   - e. [ ] Decreased need for sleep, or
   - f. [ ] Easy distractibility, or
   - g. [ ] Involvement in activities that have a high probability of painful consequences which are not recognized, or
   - h. [ ] Hallucinations, delusions or paranoid thinking
3. [ ] [x] [ ] Bipolar syndrome with a history of episodic periods

manifested by the full symptomatice picture of both manic and depressive syndromes (and currently characterized by either or both syndromes)

4. [x] [ ] [ ] Other: Dysthymia-mild

IV. RATING OF IMPAIRMENT SEVERITY

A. "B" Criteria of the Listings

The following functional limitations (which apply to paragraph B of listings 12.02-12.04 and 12.06-12.08 and paragraph D of 12.05) exist as a result of the individual's mental disorder(s).

NOTE: Items 3 and 4 below are more than measures of frequency. Duration and effects of the deficiencies (item 3) or episodes (item 4) are discussed in the decision.

Listing(s) under which the items below are being rated: 12.04

FUNCTIONAL LIMITATION AND DEGREE OF LIMITATION

---

1. Restrictions of Activities of Daily Living:

None[ ] Slight[ ] Moderate[x] Marked*[ ]
Extreme[ ] Insuff Evid[ ]

---

2. Difficulties in Maintaining Social Functioning:

None[ ] Slight[x] Moderate[ ]
Marked*[ ] Extreme[ ] Insuff Evid[ ]

---

3. Deficiencies of Concentration, Persistence or Pace Resulting in Failure to Complete Tasks in a Timely Manner (in work settings or elsewhere):

Never[ ] Seldom[ ] Often[x] Frequent*[ ]
Constant[ ] Insuff Evid[ ]

---

4. Episodes of Deterioration or Decompensation in Work or Work-Like Settings Which Cause the Individual to Withdraw from that Situation or to Experience Exacerbation of Signs and Symptons (which may Include Deterioration of Adaptive Behaviors):

Never[ ] Once/Twice[ ] Repeated*(3+)[ ]
Continual[ ] Insuff Evid[ ]

---

*Degree of limitation that satisfies the Listings: Extreme, Constant and Continual also satisfy that requirement.

B. Summary of Functional Limitation Rating for "B" Criteria

NO. OF FUNCTIONAL LIMITATIONS MANIFESTED AT THE LISTING LEVEL: [0] (The number must be at least 2 to satisfy the requirements of paragraph B in Listings 12.02, 12.03, 12.04, and 12.06 and paragraph D in 12.05; and at least 3 to satisfy the requirements in paragraph B in Listings 12.07 and 12.08.)

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

SANDRA K. FORNEY SSN: 546-66-9538 Plaintiff, vs. DONNA E. SHALALA, Secretary of Health & Human Services, Defendant.	CASE NO. 94-6357-J0 COMPLAINT TO REVIEW AND SET ASIDE THE FINAL ORDER OF THE SECRETARY PURSUANT TO 42 U.S.C.A. § 405(g).

The above-named plaintiff makes the following representations to this court for the purpose of obtaining judicial review of a final decision of the Secretary adverse to Plaintiff:

I

This is an action to review the final order of the Secretary of Health and Human Services, of which this

Court has jurisdiction pursuant to 42 U.S.C.A. §405(g), as amended.

II

Plaintiff is a U.S. citizen, a resident Bend, County of Deschutes, in the Judicial District of this Court.

III

On or about November 18, 1991, Plaintiff duly filed an application with the Social Security Administration for disability insurance benefits under 42 U.S.C.A. §§ 423(a) and 416(i) (1974) of the Social Security Act.

IV

Said application was denied and denied again after reconsideration. Plaintiff timely filed a request for hearing.

V

On April 18, 1994, after a hearing held before him, Stephen P. Kramer, administrative law judge for the Social Security Administration, denied Plaintiff's claim on the grounds that Plaintiff was not disabled as defined by the provisions of the Social Security Act, as amended, at the time of adjudication.

VI

Plaintiff timely appealed the ALJ's decision. By Order of the Appeals Council dated July 30, 1993, the Appeals Council of the Social Security Administration remanded Plaintiff's Social Security case for further proceedings, including a new hearing.

VII

On April 27, 1993, after a hearing held before him, Stephen P. Kramer, administrative law judge for the Social Security Administration, denied Plaintiff's claim again on the grounds that Plaintiff was not disabled as defined by the provisions of the Social Security Act, as amended, at the time of adjudication.

VIII

Plaintiff timely appealed the ALJ's decision. By Action of the Appeals Council dated July 28, 1994, the Appeals Council of the Social Security Administration denied Plaintiff's Request for Review, thereby sustaining the decision of the administrative law judge. This resulted in the ALJ's decision becoming the final order of the Secretary from which Plaintiff now appeals to this Court.

IX

Plaintiff was under a disability commencing on or before June 7, 1991, and is presently under such disability which entitles her to benefits under the Social Security Act.

X

Pursuant to 42 U.S.C.A. §405(g), Plaintiff files this action requesting the Court to reverse said decision, or, in the alternative, to remand this cause for proper evaluation of the evidence or a rehearing *de novo* on the following grounds:

1. The decision of the Secretary is without foundation, not supported by substantial evidence, and is, in fact, contrary to the evidence presented.

2. The Secretary erred in his failure to apply the appropriate standard of law.

XI

The decision and actions of the Secretary are not substantially justified within the meaning of the Equal Access to Justice Act, 28 U.S.C.A. §2412(b)(d).

WHEREFORE, Plaintiff prays for judgment against Defendant as follows:

1. That this court reverse and set aside the decision of Defendant denying Plaintiff's claim for disability benefits;

2. In the alternative, that this court remand the case back to the Secretary for proper evaluation of the evidence or a hearing *de novo*;

3. For costs of suit incurred herein and attorneys' fees;

4. For such other relief as the court deems just and proper.

DATED THIS 12th day of September, 1994.

/s/ Ralph Wilborn
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

SANDRA K. FORNEY, Plaintiff, V. DONNA E. SHALALA, Secretary of Health and Human Services, Defendant.	Civil No. 94-6357-JO ANSWER

Defendant, for Answer to plaintiff's Complaint, admits, denies and alleges as follows:

I.

Admits the allegations contained in Paragraphs I through VIII.

II.

Denies the allegations contained in Paragraphs IX and XI.

III.

With respect to Paragraph X, the defendant states that these constitute a Prayer for Relief to which no response is deemed necessary. However, if the court requires a response, the defendant denies that the plaintiff is entitled to judgment or the relief sought.

IV.

With respect to the plaintiff's request that this case be remanded by the Court to the defendant, the defendant states that the plaintiff has not shown "good cause" pursuant to § 205(g) of the Social Security Act, 42 U.S.C. § 405(g), to warrant remand.

V.

With respect to the plaintiff's request for costs, the defendant states there are no provisions in the Social Security Act to permit costs to be charged against the defendant. However, costs charged against the United States can be paid from general revenues by the General Accounting Office, if so ordered by the Court.

VI.

With respect to the plaintiff's request that attorney's fees be awarded by the Court, the defendant states that this Court, pursuant to § 206(b) of the Act, 42 U.S.C. § 406(b), may award a reasonable fee, under Title II only, not in excess of twenty-five percent (25%) of total past-due benefits, such fee to be paid from such past-due benefits, where the Court renders a judgment favorable to the plaintiff.

VII.

With respect to the plaintiff's request for attorney's fees under the Equal Access to Justice Act, should the plaintiff prevail and file an application for fees against the United States in accordance with 28 U.S.C. § 2412, enacted as part of the Equal Access to Justice Act, the defendant reserves the right to oppose any award under this statute.

VIII.

Defendant denies each and every allegation of the Complaint not otherwise specifically admitted, denied or qualified.

IX.

The findings of fact of the Secretary of Heath and Human Services are supported by substantial evidence and are conclusive.

X.

In accordance with § 205(g) of the Social Security Act, 42 U.S.C. § 405(g), the defendant files as part of the Answer a certified copy of the transcript of the record, including the evidence upon which the findings and decisions complained of are based.

WHEREFORE, the defendant prays for a judgment dismissing the Complaint, with costs and disbursements, and for a judgment in accordance with § 205(g) of the Social Security Act, 42 U.S.C. § 405(g), affirming the agency decision.

DATED this 23 day of November, 1994.

Respectfully submitted,

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District of Oregon

/s/ Craig J. Casey
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Assistant United States
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

SANDRA K. FORNEY, Plaintiff,	CIVIL ACTION NO. 94-6357-JO
vs.	PLAINTIFF'S MEMORANDUM IN SUPPORT OF PETITION FOR JUDICIAL REVIEW
DONNA E. SHALALA, Secretary of Health & Human Services, Defendant.	

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

SANDRA K. FORNEY, Plaintiff, vs. DONNA E. SHALALA, Secretary of Health & Human Services, Defendant.	CIVIL ACTION NO. 94-6357-JO PLAINTIFF'S MEMORANDUM IN SUPPORT OF PETITION FOR JUDICIAL REVIEW

STATEMENT OF THE CASE

This action is brought pursuant to § 205(g) of the Social Security Act, (42 U.S.C. § 405(g)), to obtain judicial review of the final decision of the Secretary of Health & Human Services denying Plaintiff's claim for disability

insurance benefits pursuant to § 223 (42 U.S.C. § 423) of the Social Security Act.

PROCEDURAL BACKGROUND

On November 18, 1991, Plaintiff filed for disability insurance benefits under Title II of the Social Security Act. (Tr. 96-99). This application was denied initially and upon reconsideration. (Tr. 110-11 and 125-26). Plaintiff requested a hearing (Tr. 127-28). After holding a hearing, on April 27, 1993, Administrative Law Judge (ALJ) Stephen P. Kramer, issued a decision denying Plaintiff's application. (Tr. 211-23). Plaintiff requested review by the Appeals Council (Tr. 224-25) and on July 30, 1993, by Order of Appeals Council Remanding Case To Administrative Law Judge, the Appeals Council granted the request for review and remanded Plaintiff's claim for further administrative proceedings. (Tr. 231-32).

Following another hearing, by decision dated April 18, 1994, ALJ Kramer once again issued a decision denying Plaintiff's claim. (Tr. 10-28). Plaintiff again requested review of the ALJ's decision by the Appeals Council (Tr. 8-9). However, the Appeals Council declined to grant the request for review. (Tr. 5-6). This action resulted in the ALJ's April 18, 1994, decision becoming the final order of the Secretary from which Plaintiff seeks judicial review.

STATEMENT OF THE FACTS

Born August 1, 1946, (Tr. 96) Plaintiff was 47 years old when the ALJ issued his decision. Plaintiff alleges disability beginning June 7, 1991, based on Fibromyalgia

and depression. She completed the 10th grade of high school and obtained her GED in 1977. (Tr. 139 and 263). Her past work was identified at her first hearing by the vocational expert as a composite of the following occupations: 1) Head Cook, School Cafeteria, DOT #313.131-018, a skilled, medium level job; 2) Baker, DOT #526.381-010, a skilled, heavy level job; and 3) Manager, School Lunch Room, DOT #187.167-026, a skilled, light level job. (Tr. 276).

THE DOCUMENTARY AND MEDICAL RECORD

Plaintiff's Mental Impairment:

Plaintiff's primary impairment is based on pain and other discomforts associated with fibromyalgia. Additionally, as the result of limitations placed upon her ability to engage in a normal lifestyle, Plaintiff has developed an adjustment disorder with depressed mood. The medical advisor called by the ALJ at Plaintiff's second hearing opined that this mental impairment resulted in *moderate* restrictions in Plaintiff's mental residual functional capacity as set out on the form at Tr. 293-95. Because the ALJ adopted Dr. Moulton's opinions, and because Plaintiff does not contest Dr. Moulton's opinions, no summary of Plaintiff's psychological record is necessary.

Plaintiff's Physical Impairment:

Plaintiff's primary disability is based on fibromyalgia, a term which is used interchangeably throughout the instant record with the term "fibrositis." In her report of December 6, 1993, Nancy Brennan, D.O., described the disease as follows:

> The Premier on Rheumatic Diseases, 9th Edition, published by the Arthritis Foundation, "reports that the hallmark of the examination of a fibrositis patient is the lack of objective findings, in relationship to the plethora of symptoms." (Page 228). The diagnosis tends to be one of exclusion of other rheumatologic conditions. With her past history of negative rheumatologic serology, and her below outlined physical examination, fibra myalgia (sic) syndrome is the most reasonable diagnosis of her symptoms.

(Tr. 252).

Plaintiff's fibromyalgia began several years before it disabled her from working. In May, 1992, she reported to Dr. Greenough that her muscle pain became more severe in the latter part of 1987, and that it was originally diagnosed as rheumatoid arthritis, but medications normally used to treat that disorder did not help. (Tr. 166).

Plaintiff's treating physician is Steven W. Cross, M.D. In August, 1988, Plaintiff saw Dr. Cross with the "complaint of morning stiffness, lots of aches and pains." (Tr. 173). At that time, he assessed probably fibrositis and started her on Flexeril and Lasix. By the end of the month, Plaintiff reported feeling much better. (Tr. 173). A year later, in August, 1989, Dr. Cross noted she was doing much better; that she had stopped the Lasix because it seemed to have the opposite of the intended effect, causing swelling and water retention; and that she was continuing to take the Flexeril. (Tr. 173).

On February 5, 1990, Plaintiff consulted Dr. Cross with complaints of not feeling right, being headachey, and being unable to concentrate. He started her on

Hydrochlorothaizide and Ibuprofen. By February 26, 1990, Plaintiff reported feeling tired all the time, dropping things at work, and not getting any relief for even a few hours per day as she usually did. Dr. Cross noted Plaintiff had pressure point tenderness across her shoulder, wrists, and ankles; that her hypertension was possibly related to Ibuprofen; and that her fibrositis was not well controlled. He planned to continue Plaintiff on Hydrochlorothiazide and Flexeril, to stop the Ibuprofen, and to have her see Dr. Tretheway. (Tr. 174).

On March 9, 1990, Plaintiff reported feeling much better. Dr. Tretheway has started her on Amitriptyline which appeared to help her sleep and feel better during the day. She was walking two miles a day, with improvement in her stiffness and point tenderness. Dr. Cross' assessment was that she had marked improvement in her fibrositis. (Tr. 174).

In August, 1990, Plaintiff saw Dr. Cross for a followup of her fibrositis and an annual employment examination. She reported having a continuing problem with fibrositis but felt better emotionally. She reported sleeping well and being less stiff in the morning, with most of her problems starting "after about four hours of work." At the time, she was working as a custodian instead of as a cook. (Tr. 175).

On October 7, 1991, Plaintiff saw Dr. Cross for followup of her fibrositis. She reported being no longer able to work because the "pain is just to[o] great for the amount of time she spends on her feet." Objectively, Dr. Cross noted she still had the same findings of fibrositis, pressure point tenderness,stiff joints, and sore muscles.

He advised her to quit work at that time, and noted he would fill out her disability papers for her. (Tr. 176).

On November 8, 1991, Plaintiff reported having more aches and pains, although she was no longer working. She was trying to stay active with water aerobics and walking, but "the pain is getting somewhat more intense." She complained of pains in her arms and legs and occasional weakness. (Tr. 176).

By letter dated January 6, 1992, Dr. Cross wrote to the Secretary, stating his opinion of Plaintiff's residual functional capacity, in relevant part, as follows:

> On 10/17/91 I advised Sandra to quit work. Sandra is suffering from fibrositis requiring Flexeril and Amitriptyline and Ibuprofen to help control her discomfort. The fibrositis is such that [it] inhibits her in doing much of her work. She is unable to stand more that 15 minutes at a time. I do not want her walking more than 20 minutes at a time. I do not want her lifting more than 15 lbs. I do not want her carrying more than 15 lbs. for more than 30 feet. She could work maybe two hours out of a[n] eight hour day.

(Tr. 164).

On May 21, 1992, Plaintiff saw Dr. Cross for a physical examination. She reported having pain on a daily basis throughout the day; she reported walking two miles a day and doing water aerobics. This activity was noted to help keep her flexibility but not to alleviate her pain. Plaintiff reported being able to sleep by taking Flexeril and Amitriptyline. She reported doing her housework,

although inefficiently. Apart from her exercise, "[a]ctivities of daily life" were reported to be the extent of her activity. Dr. Cross' assessment was of chronic fibrositis. (Tr. 176). On August 14, 1992, Plaintiff's subjective reports were similar, and Dr. Cross noted she was continuing her walking and water aerobics as recommended. He assessed "Fibrositis, presently controlled," and he noted he would see her every 3 months. (Tr. 183).

In September, 1992, Plaintiff underwent a psychiatric evaluation by Terry Schrader, M.D., at the request of the Secretary. Dr. Schrader addressed Plaintiff's goals as follows:

> Patient[']s goals are to "sleep well at night", and "maintain as much function as possible". She does this by following her doctor[']s orders and maintaining an active schedule. She arises between 7-8 A.M. She finds walking, up to 2 miles a day, water exercise, and a jacuzzi tub the most helpful. She takes "alot of time" to do her housework, but she "gets it done". She dresses herself. She enjoys seeing her grandchildren. She usually rests every day. She goes to bed about midnight. Sometimes pain awakens her.

(Tr. 236).

Dr. Schrader reported that Plaintiff's MMPI profile was considered valid and "consistent with her diagnosis of Fibrositis. There is no evidence of a tendency to exaggerate her symptoms." (Tr. 237).

Dr. Schrader opined that Plaintiff's psychiatric complaints were consistent with her physical problems, and that her symptoms of depression were relatively mild and consistent with her loss of physical function. He noted

that although Plaintiff "believes that her pain management is between than it was a year ago, she still has pain complaints. She states pain "no longer controls her life". Nevertheless, Dr. Schrader believed Plaintiff might benefit from a pain management program, and he discussed it with her. (Tr. 237).

In April, 1993, Plaintiff reported that her fibrositis was more painful. On examination, Dr. Cross observed that her pressure points were more tender, and he opined that she had outlived the usefulness of her Ibuprofen treatment. Accordingly, he started her on Daypro. (Tr. 285). By the end of April, 1993, Dr. Cross noted Plaintiff was feeling better on Daypro; that she was having less burning; and that her fibrositis was improved. (Tr. 286).

On July 23, 1993, Dr. Cross performed a followup examination of Plaintiff. He noted that her "daily life consists of walking two miles a day, doing water aerobics, and taking her medication. She does do some housework, usually just dishes. Occasionally she will have a day when she can clean the whole house, but then suffers for it the next day. She however is maintaining a good attitude and is interested in maintaining her health . . . " (Tr. 286). Dr. Cross noted that the only place Plaintiff did not have pressure point tenderness is her left forearm, and his clinical impression was listed as fibromyalgia, chronic, stable. (Tr. 286).

On October 27, 1993, Dr. Cross noted that Plaintiff's Daypro was not helping as much as did the Ibuprofen, and that Plaintiff needed to increase her dosage of Amitriptyline from 25 mg. to 50 mg. Otherwise, she

appeared stable and was noted still to be exercising. (Tr. 287).

On November 22, 1993, also at the request of the Secretary, Plaintiff underwent a consultative physical examination by Nancy Brennan, D.O. Plaintiff reported two major complaints, *i.e.*, significant generalized muscular pain, and generalized muscular weakness. She rated her pain on a scale of 1 to 10, with 1 being the least pain and 10 being the greatest, as a 10. She reported having muscle pain with easy muscle fatiguability and an inability to perform consistently activities of daily living. (Tr. 251). Dr. Brennan noted that the "musculoskeletal exam is remarkable for the almost total presence of tender points, consistent with fibramyalgia (sic)." (Tr. 252). She reported her objective examination results as follows:

> . . . . She has tender points at the insertion of the nuchal muscles, and to the occiput, upper trapezial border. She has tender points across the anterior petoralis muscle, lateral to the 2nd costochondral junction. She has tender points approximately 2 cm below the outer lateral epicondyle. She has tender points along the iliac crest, along the upper gluteal area, just posterior to the greater trochanter. She also has points of the medial knee, and at the gastrocnemius achilles tendon junction. She is absent the middle of the forehead control point, but has the control point on the volar aspect of the mid forearm, and on the muscles of the anterior thigh. She has reduced range of motion of her shoulder. Arm abducts to 115 degrees, external rotation is reduced by 10 degrees, and internal rotation is reduced by 10 degrees. The muscle strength of the trapezius and deltoid and biceps

> are both approximately 4 our [sic] of 5. She does complain of significant amount of pain with muscle contraction against resistance, and develops gross tremor of the tested extremity with exertion. The tremor appears to be out of proportion with the amount of exertion applied, however, it does seem to be involuntary. Her cervical range of motion is normal. She is able to flex her neck to 45 degrees, extend to 45 degrees, side bend and rotate (R) and (L) to 45 degrees. Her lumbar spine, she flexes greater than 90 degrees, but has not the muscle strength to pull her trunk up erect. She walks up her anterior thighs with her hands. Her quadriceps are unable to raise her body weight from a squatting position. Her quadriceps and hamstrings strength is 3 out of 5. She has difficulty rising from a low seated position, and is unable to perform this repetitiously.
>
> During the Examination, except for observing muscle strength and ambulation, she sat for approximately 30 minutes. She did shift her weight from one side to the other, and appeared to be somewhat uncomfortable. She was unable to stand for an extended period of time, and she would lean against the exam table, or against the counter, to take weight off of one leg at a time.
>
> There was clearly no observed pathology, except for the above mentioned muscle weakness, and gross tremor, and there is no evidence of end organ damage from the fibramyalgia (sic).
>
> In my opinion, based on the objective medical findings, I do not feel that she would be able to sit, stand, or walk for any appreciable length of time without shifting her weight, or moving

> about to a new position. I am sure she would be unable to lift, carry, reach over her head, or handle objects that would be heavier than a pound or two for any length of time. Her hearing and speaking are unaffected, however she does demonstrate a lapse of concentration, and some lapses in her memory.

(Tr. 252-53).

In addition to her report, Dr. Brennan completed a form on which she indicated her opinion to Plaintiff's physical residual functional capacity. In relevant part, she opined Plaintiff could lift/carry a maximum of 10-15 pounds occasionally and that she could not lift/carry frequently. She could stand/walk 15 minutes at a time for a total of 2 to 3 hours per 8-hour workday. She could sit 45 minutes at a time for a total of 6 hours per 8-hour workday. She could occasionally climb and stoop, but she could never kneel, balance, crouch or crawl. Dr. Brennan also noted that repetitive pushing/pulling aggravate Plaintiff's trigger points and that reaching and pushing/pulling were affected to an unspecified degree. Finally, she opined that Plaintiff's fibromyalgia also caused environmental restrictions and that temperature extremes and noise could exacerbate it. (Tr. 255-57).

The last progress note from Dr. Cross is dated February 1, 1994. At that time, Dr. Cross saw Plaintiff for followup of her complaints related to her fibromyalgia. He noted she was doing fairly well; that she was doing water aerobics six days per week; and that she did not want to end up like other people with the problem in wheelchairs and walking aids. His clinical impression was listed as chronic fibrositis, and he planned to have

her continue on Ibuprofen, Amitriptyline, and her exercise activity. (Tr. 287).

On February 9, 1994, Plaintiff underwent a two hour physical capacity evaluation at Physical Therapy Associates. The evaluators noted that Plaintiff was "cooperative and demonstrated consistent, full participation in all the assessments and tasks. Significant restrictions noted during the evaluation were as follows:

> . . . . patient demonstrates below entry-level work ability for activity below 38" above floor level.
>
> 2. Decreased thoracolumbar spine, hip and upper extremity range of motion limits her tolerance to vertical or horizontal reaching, 6"-24" from her torso. During administration of the Minnesota Rate of Manipulation Standardized Test, patient performs in the 25th percentile for activity using her right dominant hand only, as compared to bimanual tasks with scores which range from the 5th to 8th performance percentiles.

(Tr. 289).

* * *

> 4. Demonstrated decreased cervical range of motion by inclinometer, especially left rotation and flexion. Functionally, her tolerance is limited for sustained even slight forward bent or awkward neck postures.
>
> 5. Demonstrated significant deconditioning in extremities and trunk for repetitive bending, sustained stand/walk and repetitive materials handling tolerance.

> 6. Reported moderate to high levels of reported pain symptoms. Pain diagram was within normal limits for diagnosis with multiple-site tender points.
>
> 7. Demonstrated sedentary work capacity with a projected part-time work tolerance at this level. Barriers to return to work include length of time off work (since October 1991), generalized deconditioning and poor to fair pain management skills. Ms. Forney also has given up driving, even for short distances, due to increased fibromyalgia symptoms.

(Tr. 290).

In addition to the narrative report, the Physical Therapy Associates evaluators completed a form on which they indicated their opinions of Plaintiff's residual functional capacity. In relevant part, it was noted that she was able to lift/carry/push/pull only up to 10 pounds occasionally and that she would not be able to do any such activities frequently. She was unable to kneel, crouch, crawl, or balance; she could rarely climb stairs; and she could only occasionally bend and reach. She could sit from zero to 30 minutes at a time up to 3 to 4 hours per 8 hour day; she could stand 30 minutes at a time, up to 3-4 hours per 8 hour day; and she could walk 30 minutes $1^1/_2$ hours at a time, up to 4 to 5 hours per 8 hour day. (Tr. 291).

HEARING TESTIMONY

On January 13, 1993, Plaintiff attended her first hearing before ALJ Kramer. At that time, she was not represented. (Tr. 260).

Plaintiff's Testimony At Her First Hearing:

Plaintiff testified that she worked until June 7, 1991, when school recessed for the summer months. She worsened over the summer, but returned to work in September, 1991. Thereafter, she worked through October 2, 1991, at which time the pain, burning, and fatigue caused by her fibromyalgia caused her to quit work.

She testified that she takes a prescription dose of Ibuprofen daily but that it does not control her pain. She described her pain as follows:

> It varies somewhat. A good day is more like having the flu and just being ache[y] all over. The severest form is when it, what I call fire, the muscles are burning. And that can go for days and then it will stop and then just be back to ache[y] and stiff and, but it's always present. It's never gone anywhere.

(Tr. 266).

She testified she could usually walk two miles; (Tr. 266) that she tries to do so once daily; that it takes her an hour to walk that far; and that by then, she's "tired and really burning." Describing her ability to sit, she stated, "Sittings uncomfortable. If I sit more than a few minutes it becomes unbearable almost." Addressing her ability to lift, she testified, "I could probably lift, I could lift probably between 15 and 20 pounds, if it wasn't repetitive." She could lift "very little" repetitively because the "pains in [her] shoulders become acute." (Tr. 267).

She engages in water aerobics daily, doing primarily stretching exercises for 15 minutes, then she treads water for a minute or so before using the jacuzzi. (Tr. 267).

Originally, she went to a health club for such activities, but she moved to an apartment expressly so that she could use its indoor pool. (Tr. 268).

Addressing her activities of daily living, Plaintiff testified she goes shopping for small amounts of groceries, but on a weekly basis, her husband accompanies her.

Plaintiff's Testimony At Her Second Hearing:

> At her second hearing, Plaintiff testified that she left her job for the following reasons:
>
> I could no longer do it physically. I couldn't do the job requirements. I couldn't do the lifting or the standing or anything it entailed that it really – I even had in the afternoon simple book work. I couldn't sit long enough to just to, to concentrate on it. All I could concentrate on was the pain . . .

(Tr. 55).

Asked about the medication she takes, Plaintiff testified that she takes Amitriptyline and Flexeril and has been doing so for about three years. (Tr. 57). She also takes Ibuprofen; however its effectiveness has diminished and is not taken in a lower dosage because of the risk of long-term use causing kidney damage. Plaintiff explained that the Ibuprofen takes the edge off the pain, and that "without it it's unbearable." (Tr. 58-59). "I'm still in pain but it's not quite as severe. Without it the burning is so intense that it's almost unbearable. With it, it seems to just – just on the edge of not being in the bed. I can, I can still move around with it." (Tr. 59).

Addressing the effect of her stopping work on her fibromyalgia, Plaintiff explained that "[b]y not working I can take care of myself. I mean when you're working once the pain starts in to be intense there's no way to relive it at all. Not working I can do whatever I feel I need to do. Like if it's stretching or if it's laying down or walking or whatever, out in the swimming pool or the spa or hot showers or – and these are things that go on on a regular basis . . . " (Tr. 60). Plaintiff also discussed her exercise program, explaining that it came from the Arthritis Foundation and that she and her doctor worked on it together. The program involves water aerobics in her swimming pool and walking. She described it and its effect on her symptoms as follows:

> A In a swimming pool. Treading water, laying on your stomach and holding on to the side and gently stretching your legs and your arms, walking back and forth in the pool. What else do I do?
>
> Q How long do you stand in the pool each time?
>
> A I'm in the pool a half an hour and then I'm in the spa for 10 minutes.
>
> Q . . . And you do that what time usually?
>
> A It's at nine. * * *
>
> Q And then what do you do during the day?
>
> A After that I'll – by then the burning is intense and I go home and –
>
> Q Does that – what does that do? What do you notice after you're in the pool and in the spa for a while?

A It increases. The pain begins to increase. The burning begins to increase.

Q The, the limited exercise seems to make your pain worse?

A All through, yeah.

Q And do you take your ibuprofen before you do this?

A Before.

Q * * * When do you do your walking?

A That's after I've rested. Usually by the time I do[,] the burning is intense by then and I have to take time to – either to rest – it just depends on how bad it is. I – sometimes just sitting for a little while or – little while I mean like a half an hour. Sometimes I have to lay down.

(Tr.62).

Q You mean after you're done with the pool exercises? * * *

A Right. Sometimes It's just a half an hour, but if I lay down it usually runs between a hour, hour and a half.

Q And you don't do anything during that period?

A No, I lay down – well I do. I work on the meditation techniques. * * *

Q And when you walk how far do you go and where do you go?

A I walk two miles a day. The store is – I walk from my, from my apartment to there and back it two miles. . . .

Q Do you go shopping or just walk and come back?

(Tr. 63).

A I just walk. I walk there mainly because inside the store there's a bench and if I can't continue that way I can sit for a little bit. I try to go through it just there and back.

Q Without stopping?

A Right.

Q How's that make you feel after you've done that? * * *

A After I've made the whole trip my knees are swollen and on fire, my legs are on fire and my back and my arms except for my left arm. It doesn't always bother me like the rest.

Q What do you do usually then when you get back?

A Well when I get back I sit down again or I do heat or I do ice or whatever I feel like will help to, to calm everything down. . . .

Q Do you do other exercises or stretching during the day?

A Oh, yeah, off and on most during the day. I do simple stretches in my living room. * * *

Q Now if you don't do these exercises, you don't go walking or do your water exercises how do you feel?

(Tr.64-65).

A If I don't do that, if I don't move the muscles like if – then I become so rigid that when I do get up to do it again then it's like starting all over, you know. It's just like you have to break the muscles apart or to stretch. It's, it's not good so I try not to –

Q So you do this every, every day?

A Every day I do it. Well Sunday I don't walk.

Q But you do go to the pool?

A Yeah, I go to the pool.

Q . . . how would you describe how your muscles feel? Is it, is it pain, is it fatigue, is it weakness, is it what?

A Well, it's all of those. The pain itself years ago was an achy pain, but because I'm using those muscles, I have to use the muscles it's a burning sensation and the burn is from low to high like a gas stove. Always there, never completely gone but it's up and it's down. . . .

Q Now are these in certain spots?

A It's – no, it goes almost everywhere. Across my shoulders, down my right arm, down to my elbows. I don't have any problem in. . . . forearms. they're all – and it's down both sides of my back. My lower back burns and, and aches. My upper legs burn. The knees are tight and burning all the time and the calves of my legs are affected but they're the least affected.

(Tr. 65-66).

Plaintiff testified that she does her housework in patchwork fashion. She does not do heavy housework such as clean the walls or the carpet, and if she vacuums, "that will be pretty much it and the only thing I do every day are the eating dishes." She estimated she might spend a total of an hour per day doing housework. (Tr. 66). She cooks dinner in the evening, "and that's usually, you know, one dish type thing or crock pot . . . " (Tr. 74).

Plaintiff's husband drives her to the store once daily, as an outing, and she occasionally walks to her parents house about five blocks away. (Tr. 66-67). While Plaintiff shops for items such as bread or milk, the main shopping is done with her husband, and he "does all of the carrying." (Tr. 73). Plaintiff estimated that she could lift 15 to 20 pounds once, but she wasn't certain how high she could lift it. (Tr. 73).

Plaintiff testified that she sees her treating physician, Dr. Cross, every three months. (Tr. 67-68). When asked if her condition had changed during the past year, she testified:

A It – well the changes have come in the form of burning rather than deep ache.

Q . . . That's the way your muscles feel?

A Right. And the fatigue. Fatigue is more now than before. . . . It's a shorter period of time where I'm really exhausted. Where before the fatigue would stay pretty much on a level scale to toward the end of the day but now it doesn't take very much until I'm just really – I'm worn out and I have to lay down.

Q You mean it's easier to get tired now?

A Right.

Q And when you say you're fatigued what do you mean exactly? I mean what does it feel like?

A Absolutely no energy. I just – I don't have energy to get up and move.

Q And how often does that happen?

A Well every day there's that – I'm fatigued by the end of the afternoon, one, two o'clock. Then I have to lay down.

Q In between there I'm really, really tired and but most of the time I can – if I can lay long enough I seem to regroup. But of course I don't do anything in the evenings after, after dinner. * * *

(Tr. 69).

Q . . . Do you usually nap then during – when you're – this fatigue hits you at one or two o'clock?

A Yes, I do. I lay down.

Q . . . Do you sleep or rest or –

A Sometimes I just rest. Maybe three or four times a week I fall asleep and then it will be two or three hours before I wake up.

(Tr. 70).

Lay Witness Testimony:

In addition to Plaintiff, Plaintiff's husband, Leon Forney, also testified at her second hearing. In relevant part, he testified as follows:

> . . . . I've noticed that she's, she's still real sincere about doing her water exercises and she does that every day. She's real sincere about keeping her muscles stretched out. I think she does that to help around the house. She doesn't want to be dependent . . . on me I guess. She's really strong willed in that way. And I try to help her out but she, she like to keep, keep going. But when it comes to any of the grocery

> shopping or anything like that if it's a loaf of bread she can carry it but if it's bigger shopping, I go, I take her. She can't drive my pickup anymore at all. So she hurts when she gets home and that's just to Wagners and back and that's only approximately a mile away driving it. She will not drive it anymore. And I unload all the groceries. . . .

(Tr. 77).

Medical Expert Testimony:

At Plaintiff's second hearing, psychologist, Peter Moulton, Ph.D., testified as a medical advisor. In relevant part, he testified as follows:

> Well, of course there is the history of pain which has been diagnosed as fibrositis and although there is in one of the reports, Exhibit 16, Dr. Reno's . . . report, there is a diagnosis of somatoform pain disorder. I am not going to give a somatoform pain disorder. There is certainly a significant preoccupation with pain and there's also – we have a good compliance it appears with treatment programs and has been an effort to deal with the pain with some effect. But in view of its being given the medical diagnosis and the compliance with treatment I'm [not] going to diagnose it as a somatoform pain disorder. There is secondary to pain[,] symptoms of depression which have been diagnosed in the record. Diagnosed as adjustment disorder. There has been treatment with medication with positive results. The Amitriptyline has been given for both depression and the sleep disorder and there has been improvement. There has been noted some impairment in memory and

> concentration which would be mild to moderate. . . . I believe that a diagnosis of an ongoing dysthymia, mild is warranted. . . .

(Tr. 79).

Dr. Moulton opined that Plaintiff's mental impairments did not meet or equal a listed impairment under the Secretary's regulations at 20 C.F.R. § 404, Subpart P, Appendix 1. (Tr. 80-81). However, in offering his opinion of Plaintiff's degree of limitation and capacity, Dr. Moulton expressly stated, "I'm not really [in]cluding the effects of pain. I mean by testimony and in the record the disruption of daily living and other activities because of pain may be significant. I'm not including that as a mental disorder. (Tr. 80).

It was Dr. Moulton's further opinion that Plaintiff's mental impairment resulted in *moderate* restrictions in the ability to understand and remember detailed instructions; the ability to carry out detailed instructions; the ability to maintain attention and concentration for extended periods; and the ability to perform activities within a schedule, maintain regular attendance and be punctual within customary tolerances. (Tr. 82).

Finally, Dr. Moulton testified that "some of the depressive symptoms might be a bit more severe than they might appear. She does exercise some bit of denial as has been mentioned." (Tr. 82).

Vocational Expert Testimony:

At Plaintiff's second hearing, the ALJ called Richard Ridenour as a vocational expert. As his first vocational hypothetical, the ALJ asked VE Ridenour to assume

Plaintiff had the specified age, education and vocational history. He asked him to assume also that she had the mental residual functional capacity as stated by Dr. Moulton and that she had the physical residual functional capacity as stated by Dr. Brennan, at Tr. 255-57. In response, VE Ridenour testified that Plaintiff could not return to her past relevant work, (Tr. 86) but that she could perform the following jobs:

> 1) Order clerk, food and beverage, DOT # 269.567-014, a sedentary, unskilled job; and
>
> 2) Telephone answering service operator, DOT # 235.662-026, a sedentary, semiskilled job, with an SVP of 3.

(Tr. 87).

As his second vocational hypothetical, the ALJ referred VE Ridenour to the exhibit at Tr. 290-91. Asked to assume those stated limitations along with Dr. Moulton's assessment of Plaintiff's mental residual functional capacity, VE Ridenour's opinion remained unchanged.

(Tr. 88-89).

The ALJ's Decision

In his decision, the ALJ found, in relevant part, as follows:

> 4. The claimant's testimony, and that of her husband, was not fully credible.

5. The claimant has the residual functional capacity to perform work as described in the decision above[1] . . .

6. The claimant is unable to perform her past relevant work as a head cook, a baker, and a manager of a school lunch room program.

7. The claimant's residual functional capacity for the full range of sedentary work is reduced by the limitations described in the decision above.

8. The claimant is 47 years old, which is defined as a younger individual . . .

9. The claimant has the equivalent of a high school education . . .

* * *

12. Although the claimant's additional nonexertional limitations do not allow her to perform the full range of sedentary work, at the hearing a vocational expert

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[1] In the body of his decision, the ALJ described Plaintiff's found residual functional capacity in a confusing fashion, as follows:

. . . . I find that the claimant is capable of sedentary or light work within the ranges described below. * * * . . . limiting the claimant to work that does not involve lifting more than 15 to 20 pounds or walking more than two miles, and which allows her the ability to stand and change position at will, and * * * limiting the claimant in accordance with the functional capacity assessment described by Dr. Brennan and further considering the limitations described by Dr. Moulton . . . * * * Finally, given a hypothetical question based upon the physical capacity evaluation performed by Physical Therapy Associates, found in Exhibit 38, in addition to the same psychological limitations and vocational factors * * * As I have determined that the claimant can perform sedentary work as described on a full-time basis she would be able to perform the jobs of order clerk and answering service operator full-time. (Tr. 22).

testified that there are a significant number of jobs in the national economy which she could perform. Examples of such jobs are: food and beverage order clerk and telephone answering service operator. . . .

13. The claimant was not under a "disability," as defined in the Social Security Act, at any time through the date of this decision. . . .

(Tr. 23-24).

ARGUMENT & LEGAL ISSUE

The legal issue is whether the final decision of the Secretary is supported by substantial evidence and based on the application of proper legal standards.

Reviewability and Standard Of Review

This court may set aside the Secretary's decision when the Secretary's findings are based on legal error or are not supported by substantial evidence in the record as a whole. 42 U.S.C. § 405(g); *Martinez v. Heckler,* 807 F.2d 771, 772 (9th Cir.1986). "Substantial evidence" means "more than a mere scintilla," *Richardson v. Perales,* 402 U.S. 387, 402 (1971) (*quoting Consolidated Edison Co. v. NLRB,* 305 U.S. 197 (1938)), but "less than a preponderance." *Sorenson v. Weinberger,* 514 F.2d 1112, 1119 n. 10 (9th Cir.1975). It means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson,* 402 U.S. at 402 (*quoting Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938)).

In conducting its review, this court must consider the record as a whole, weighing both the evidence that supports and the evidence that detracts from the Secretary's

conclusion. *Jones v. Heckler,* 760 F.2d 993, 995 (9th Cir.1985).

Disability and The Sequential Evaluation

The Social Security Act provides that certain individuals who are "under a disability" shall receive disability benefits. 42 U.S.C. § 423(a)(1)(D). The statutory concept of *"disability"* is comprised of a *medical* and a *vocational* element. The Act defines *disability* as the ***"inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which . . . has lasted or can be expected to last for a continuous period of not less than 12 months."*** 42 U.S.C. § 423(d)(1)(A). This is the *medical* component of the statutory definition of disability.

The Act also provides that a claimant will be found disabled only if his impairment(s) ***"are of such severity that he is not only unable to do his previous work but cannot, considering his age, education and work experience, engage in any other kind of substantial gainful work which exists in the national economy. . . . "*** 42 U.S.C. § 423(d)(2)(A). This is the *vocational* component of the definition of disability.

The Secretary implements the foregoing definition through a 5-step sequential inquiry into whether or not a claimant should be considered "disabled." 20 C.F.R. § 404.1520(b)-(f). Five questions are posed in sequence until a question is answered affirmatively or negatively in such a way that a finding of disability or non-disability is directed. The claimant bears the burden of proof at steps 1 through 4. At step 5, the burden shifts to the Secretary.

In the instant case, steps 1 through 3 are not at issue. At step four, the ALJ found that Plaintiff retained the above-referenced residual functional capacity, but that she could not return to her past relevant work. Plaintiff does not contest the ALJ's finding regarding her ability to perform her past relevant work; she does, however, contest his finding as to her residual functional capacity. At step 5, the ALJ found that Plaintiff could perform full-time sedentary work (as described) and that she could perform two alternate jobs: food and beverage order clerk and telephone answering service operator. Plaintiff also contests this finding.

When the entire record is examined, there is not substantial evidence to support the ALJ's findings. The ALJ's decision must be reversed because it is based on improper legal standards as well.

The ALJ Failed To Reject Treating Physician Cross' Opinion by Correct Legal Standards

If there is a conflict between the opinions of treating and examining physicians, "[i]f the ALJ wishes to disregard the opinion of the treating physician, he . . . must make findings setting forth specific, legitimate reasons for doing so that are based on substantial evidence in the record." *Murray v. Heckler,* 722 F.2d 499, 502 (9th Cir.1983). The rationale behind affording the treating physician's opinion greater weight is that "he is employed to cure and has a greater opportunity to know and observe the patient as an individual." *Winans v. Bowen,* 853 F.2d 643, 647 (9th Cir. 1987), *quoting Sprague v. Bowen,* 812 F.2d 1226, 1230 (9th Cir. 1987).

Furthermore, the inability of reporting physicians to support their opinions with objective findings does not constitute the required clear and convincing reason to reject uncontroverted opinions. *Montijo v. Sec. of HHS*, 729 F.2d 599 (9th Cir. 1984). *See also, Rhodes v. Schweiker*, 660 F.2d 722 (9th Cir. 1981); *Day v. Weinberger*, 522 F.2d 1154 (9th Cir. 1975). Based on the rule of *Montijo*, the inability of treating physicians to support their opinions with objective findings cannot form the basis for rejecting such an opinion. The foregoing principles are summarized in *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988), as follows:

> We have made it clear that the medical opinions of a claimant's treating physicians are entitled to special weight and that, if the ALJ chooses to disregard them, "he must set forth specific, legitimate reasons for doing so, and this decision must be based on substantial evidence." *Cotton v. Bowen*, 799 F.2d 1403, 1408 (9th Cir. 1986); *see Summers v. Bowen*, 813 F.2d 241, 243 (9th Cir. 1987); *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983). "The ALJ can meet this burden by setting out a detailed and thorough summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and making findings." *Cotton*, at 799 F.2d at 1408. Even if a treating physician's opinion is controverted, the ALJ must provide specific, legitimate reasons for rejecting it. *Id.*
>
> * * *
>
> To say that medical opinions are not supported by sufficient objective findings or are contrary to the preponderant conclusions mandated by the objective findings does not achieve the level of specificity our prior cases have required, even when the objective factors are listed seriatim. The ALJ must do more than offer his conclusion. He must set forth his own interpretations and explain why they, rather than the doctors', are correct. *Moreover the ALJ's analysis does not give proper weight to the subjective elements of the doctors' diagnoses.* The subjective judgments of treating physicians are important, and properly play a part in their medical evaluations. *Accordingly, the ultimate conclusions of those physicians must be given substantial weight;* they cannot be disregarded unless clear and convincing reasons for doing so exist and are set forth in proper detail. *See Delgado v. Heckler*, 722 F.2d 570, 574 (9th Cir. 1983). (Underlined emphases added.)

Embrey, at 421-22.

In the instant case, the ALJ addressed Dr. Cross' opinion of Plaintiff's residual functional capacity at Tr. 15, in relevant part, as follows:

> On July 26, 1991, [Dr. Cross'] chart notes reveal that her fibrositis and hypertension were controlled. However, on October 7, 1991, he reported that she was no longer able to work because the pain was too great for the amount of time she spent on her feet. He continued describe her as incapable of working as a cook or a baker through January 6, 1992, and said that she was unable to stand for more than 15 minutes at a time, walk for more than 20 minutes at a time, lift more than 15 pounds, or carry more than 15 pounds for more than 30 feet. He stated that she could "maybe" work two hours of an eight hour day. . . .

(Tr. 15).

The ALJ rejected Dr. Cross' above-referenced opinion as follows:

> . . . . Dr. Cross has not recently expressed an opinion, and subsequent to his statement that the claimant might be limited to two hours per day (with apparent reference to her work as a cook), he has repeatedly reported that her condition has improved or stabilized. Even the claimant herself acknowledges that she is capable of more activity than that encompassed by two hours per day at an exertional capacity beyond sedentary, if both her housework and her exercise routine are considered. Although the claimant stated that her doctor supports her contention that she cannot return to work, it is conceded that she cannot return to work *as a baker or a cook*. Other work is not precluded by a statement that she could not return to work she had been doing in the past.

(Tr. 21).

To the extent the ALJ rejected Dr. Cross' assessment of Plaintiff's residual functional capacity as being limited to an opinion of what Plaintiff could do in her job as a cook, there is no support for the ALJ's rationale. Dr. Cross did not even address the physical demands required in Plaintiff's job as a cook. His statement set forth in his January 6, 1992, letter to the Secretary was written *after* he had advised Plaintiff to quit work, and it was expressly limited to setting forth his opinion of her functional capacity in an 8-hour day. (See Tr. 164).

As for Dr. Cook's reporting that Plaintiff's condition has improved or stabilized, when one examines the actual underlying chart notes, it readily becomes apparent that

Dr. Cross' statements of improvement pre-dated her quitting work or related to a period of exacerbation in March and April 1993, following which her exacerbated state improved. His characterization of Plaintiff's chronic fibromyalgia as "stable" (see Tr. 286) simply references its return to its chronic debilitating state following treatment of the exacerbation. That characterization does not imply that Plaintiff's fibromyalgia is no longer disabling as the ALJ purports to find.

Finally, the ALJ's statement to the contrary, Plaintiff did not acknowledge that she is capable of more activity than that encompassed by two hours per day at an exertional capacity beyond sedentary, if both her housework and her exercise routine are considered. Plaintiff's housework is spread out over the day and week; her exercise routine is prescribed treatment, not work activity; it is followed by rest; and it is performed at the sub-sedentary activity level, fully consistent with Plaintiff's testimony, Dr. Cross' opinion, and the assessment of the Physical Therapy Associates.

The ALJ Failed To Reject Lay Testimony By Correct Legal Standards

The law in the Ninth Circuit is clear that while the Secretary may choose to disregard or discredit subjective pain testimony, he must support his decision to do so with specific findings. *Gamer v. Secretary of HHS*, 815 F.2d 1275, 1279 (9th Cir. 1987); *Cotton v. Bowen*, 799 F.2d 1403, 1407 (9th Cir. 1986). Furthermore, in *Hammock v. Bowen*, 879 F.2d 498, 503 (9th Cir. 1989), this court held as follows:

> "The Secretary cannot insulate ultimate conclusions regarding disability from review by turning them into questions of 'credibility.' " *Jones*, 760 F.2d at 997; *see also Hale v. Bowen*, 831 F.2d 1007, 1012 (11th Cir. 1987) ("if the Secretary fails to articulate reasons for refusing to credit a claimant's subjective pain testimony, then the Secretary, as a matter of law, has accepted that testimony as true").

In *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993), the Ninth Circuit summarized the standard by which an ALJ may reject a claimant's subjective testimony as follows:

> If there is medical evidence establishing an objective basis for some degree of pain and related symptoms, and no evidence affirmatively suggesting that the claimant was malingering, the Secretary's reason for rejecting the claimant's testimony must be "clear and convincing," *Swenson v. Sullivan*, 876 F.2d 683, 687 (9th Cir. 1989), and supported by specific findings, *Varney*, 846 F.2d at 584. It's not sufficient for the ALJ to make only general findings; he must state which pain testimony is not credible and what evidence suggests the complaints are not credible. *Id.* He "must either accept [claimant's] testimony or make specific findings rejecting it." *Id.*

In the instant case, medical evidence establishes an "objective basis for some degree of the symptom and no evidence affirmatively suggests that the claimant was malingering." Accordingly, the ALJ's reasons for rejecting Plaintiff's excess symptom testimony must be clear and convincing. The medical record is consistent with Plaintiff's description of her limitations and the nature of her

physical impairments. For the ALJ to reject this testimony without supporting his decision to do so with clear and convincing reasons is reversible legal error.

Addressing an ALJ's attempt to turn disability determinations into questions of "credibility," in *Hammock v. Bowen*, 867 F.2d 1209, 1214 (9th Cir. 1989), the Ninth Circuit held:

> "The Secretary cannot insulate ultimate conclusions regarding disability from review by turning them into questions of 'credibility.' " *Jones*, 760 F.2d at 997; *see also Hale v. Bowen*, 831 F.2d 1007, 1012 (11th Cir. 1987) ("[I]f the Secretary fails to articulate reasons for refusing to credit a claimant's subjective pain testimony, then the Secretary, as a matter of law, has accepted that testimony as true."). In *Varney II*, we adopted the *Hale* rule of the Eleventh Circuit in the limited situation where the record has been fully established and the sole remaining issue is the credibility of the claimant's pain testimony. *Varney v. Secretary of Health and Human Servs.*, 859 F.2d 1396, 1401 (9th Cir. 1988) (Varney II).

In the instant case, the ALJ discredited Plaintiff's testimony for the following reasons:

> . . . . The record reflects significant discrepancies and/or omissions between the claimant's reports to various medical personnel and to the agency. She alleges severe, incapacitating pain in one instance, and then, on another, states that her condition has undergone significant improvement with treatment and medication. She told Dr. Schrader that her pain management was better than it was a year previously, and

that pain no longer controlled her life, a statement which is substantially reproduced in her reports to Dr. Cross, and yet she told Dr. Brennan that her generalized muscular pain was a "10" on a scale of 1 to 10. In the latter instance, she was aware that she was undergoing a physical examination with emphasis on evidence of fibrositis and its severity.

* * *

. . . . Even after considering her assertions of extreme pain, Dr. Brennan found that she was capable of sitting for up to six hours a day, walking or standing up to three hours a day, and occasionally lifting 10 to 15 pounds. The physical capacities evaluation likewise found that she was capable of sedentary work, and, although a further reduction to part-time work was noted, that reduction was based upon tests which are capable of distortion based upon equivocal effort, as previously discussed.

The claimant's activities are commensurate with a capacity for sedentary work, and even occasional light work. Another example of her somewhat misleading testimony is that she failed to mention at the hearing that she can occasionally clean her whole house in one day[2]. Her list of daily activities is quite broad, and while it is noted that she does not drive, apparently the only vehicle available is a pick-up truck. She

[2] This information was in the record before the ALJ (see Tr. 286). If the ALJ deemed it important, one must ask why he failed to ask Plaintiff about it. One must also ask how the ALJ can attribute Plaintiff's failure to mention this to her evasiveness when, at the same time, she also failed to mention that she "suffers for it the next day."

does housework, exercises, cooks, reads, and goes shopping daily. She does more extensive activities several times a week. The record does not support a conclusion that she must lie down for a protracted period every day, and Dr. Brennan did not note such a significant disruption in her ability to perform activities during the day. Therefore I conclude that this resting period is not medically imperative.

* * *

. . . . Even the claimant herself acknowledges that she is capable of more activity than that encompassed by two hours per day at an exertional capacity beyond sedentary, if both her housework and her exercise routine are considered. * * *

The claimant's demeanor at the hearing was not indicative of an individual who is experiencing disabling incapacity; she did not appear to be in pain or require a period in which to rest.[3] She was capable of attention to all questions asked, and her responses were rational, although somewhat evasive. Her medications are very conservative, but even this conservative treatment has produced considerable relief of her symptoms. For example, she no longer has difficulty sleeping regularly, she no longer has headaches, and she has reported improvement in her musculoskeletal pain to her examining and treating physicians, in contrast to her testimony.

(Tr. 20-21).

[3] As Tr. pages 260 and 282 establish, Plaintiff's first hearing lasted 35 minutes. At Tr. pages 52 and 95 establish, Plaintiff's second hearing last 1 hour and 10 minutes.

None of the foregoing legitimizes the ALJ's rejection of Plaintiff's testimony. It does illustrate the ALJ's single minded determination to interpret the record against Plaintiff and to justify a predetermined decision to deny her benefits, however. There is nothing in the record to suggest that Plaintiff exaggerates her symptoms or that she was evasive. Dr. Schrader expressly stated that Plaintiff's MMPI profile was consistent with her diagnosis of fibrositis and that there was no evidence of a tendency to exaggerate her symptoms. (Tr. 237). Further, in the report of her two-hour physical capacities evaluation, Physical Therapy Associates expressly noted that Plaintiff demonstrated consistent, full participation in all the assessments and tasks. Further, the reliability tests noted at Tr. 292 were all normal.

As for the ALJ's comments on Plaintiff's demeanor, he does not describe her demeanor at all. He simply disparages it in an apparent attempt to protect his conclusion from review. The ALJ's finding is not a legitimate credibility finding; it is nothing more than the infamous "sit and squirm" method of jurisprudence which has been condemned in this circuit for years. In *Gallant v. Heckler,* 753 F.2d 1450, 1454-55 (9th Cir. 1984), the Ninth Circuit condemned such tactics in the following fashion:

> The ALJ found Gallant's allegations of disabling pain not credible or convincing. In making this determination, the ALJ stated he considered claimant's testimony, the objective medical evidence, claimant's daily activities and claimant's demeanor at the hearing. *While the ALJ can disregard a claimant's self-serving statements, to do so they must be unsupported by objective findings. Maounis v. Heckler,* 738 F.2d 1032, 1034 (9th Cir. 1984) (Emphasis added). . . .
>
> The ALJ in part based his rejection of the objective medical evidence and the claimant's subjective complaints of constant pain on Gallant's demeanor at the hearing, noting that he sat for over an hour without any apparent distress. The fact that a claimant does not exhibit physical manifestations of prolonged pain at the hearing provides little, if any, support for the ALJ's ultimate conclusion that the claimant is not disabled or that his allegations of constant pain are not credible, *Day v. Weinberger,* 522 F.2d 1154, 1156-57 (9th Cir. 1975). No clear and convincing reasons were provided by the ALJ for his rejection of the testimony of Gallant regarding his constant and persistent back pain. *Gallant,* at 1455.

Additionally, in *Perminter v. Heckler,* 765 F.2d 870, 872 (9th Cir. 1985), the Ninth Circuit had the following to say about an ALJ's reliance on his personal observations of the claimant at the hearing:

> The ALJ's reliance on his personal observations of Perminter at the hearing has been condemned as "sit and squirm" jurisprudence. *Freeman v. Schweiker,* 681 F.2d 727, 731 (11th Cir. 1982). Denial of benefits cannot be based on the ALJ's observation of Perminter, when Perminter's statements to the contrary, as here, are supported by objective evidence. *Coats v. Heckler,* 733 F.2d 1338, 1341 (9th Cir. 1984).

In *Montijo v. Secretary,* 729 F.2d 599, 601 (9th Cir. 1984), citing *Lewis v. Weinberger,* 541 F.2d 417, 421 (4th Cir.

1976), the court noted that in cases involving alleged psychological disability, the ALJ's observation of the claimant at the hearing does not provide a sufficient reason to reject otherwise uncontroverted medical evidence. *Montijo*, at 602.

In *Jones v. Heckler*, 760 F.2d 993, 997 (9th Cir. 1985), the Ninth Circuit addressed a case which included typical ALJ language impugning an applicant's credibility due to an alleged disparity between complaints and findings. Noting, however, that the complaints were, in fact, supported by the medical records, the court stated that the Secretary cannot insulate ultimate conclusions regarding disability from Court review by turning them into questions of credibility.

Plaintiff submits that the Secretary's case hinges entirely upon turning this case into one of credibility, and, by doing so, he expressly attempts to insulate his ultimate conclusions from court review. Pursuant to the law of this circuit, that attempt must fail.

The ALJ's failure to specify legitimate reasons for discounting symptom testimony is legal error. The Secretary cannot meet her legal burden merely by citing a discrepancy between subjective complaints and objective findings (especially when, as here, no such discrepancy exists). If the record is complete and the claimant would be disabled if symptom testimony were credited, the testimony is deemed to be true and the court will find the claimant disabled. *Varney v. Secretary of HHS*, 859 F.2d 1396 (9th Cir. 1988) (*Varney II*). In *Varney II*, the Ninth Circuit held on this issue as follows:

> In cases where there are no outstanding issues that must be resolved before a proper disability determination can be made, and where it is clear from the administrative record that the ALJ would be required to award benefits if the claimant's excess pain testimony were credited, we will not remand solely to allow the ALJ to make specific findings regarding that testimony. Rather we will follow the Eleventh Circuit's practice and take that testimony to be established as true.

Varney II, at 1401.

It is self-evident that if Plaintiff is limited as she testified and as her treating physician opined, she is disabled. Indeed, at Plaintiff's hearing held January 13, 1993, addressing Dr. Cross' opinion that Plaintiff was restricted to a two hour workday, the ALJ stated, "[I]t's obvious that if I accepted that as true that the claimant would have to be found disabled." (Tr. 280). Accordingly, when Plaintiff's testimony is credited, a finding of disability follows, and this court should direct an award of benefits. In accordance with *Varney II*, remand for specific findings is unnecessary.

Apart from improperly discrediting Plaintiff's testimony, the ALJ also failed properly to reject the testimony of Plaintiff's husband, Leon Forney. Indeed, the ALJ appears not to have addressed a single word to explaining his rejection of such testimony. In *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir. 1987), the Ninth Circuit noted that friends and relatives in a position to observe a claimant's symptoms and daily activities can provide competent evidence to substantiate medical opinions of

record, or to show directly how an impairment affects the claimant's ability to work. Further, the court held –

> Disregard of this evidence violates the Secretary's regulation that he will consider observations by non-medical sources as to how an impairment affects a claimant's ability to work. 20 C.F.R. § 404.1513(e)(2).

Id.

Finally, in *Dodrill, supra,* the Ninth Circuit held as follows:

> . . . . An eyewitness can often tell whether someone is suffering or merely malingering. While this is particularly true of witnesses who view the claimant on a daily basis, the testimony of those who see the claimant less often still carries some weight. If the ALJ wishes to discount the testimony of the lay witnesses, he must give reasons that are germane to each witness.

Dodrill, at 919.

The ALJ's failure to base his rejection of lay testimony on the record and to give reasons germane to each witness is reversible error.

Step Five Of The Sequential Analysis

Once a claimant shows she can no longer perform past relevant work (step four), *the burden of persuasion shifts to the Secretary* to show that the claimant can engage in other substantial gainful activity (step five). *Bonilla v. Secretary HEW,* 671 F.2d 1245 (9th Cir. 1982). As noted, the

ALJ expressly found that Plaintiff *cannot* perform her past relevant work.

At step five, to show that a claimant can engage in other work, the Secretary may, as in the instant case, call upon a VE. The ALJ then poses one or more vocational hypotheticals detailing the claimant's physical and mental residual functional capacities. The VE considers all the limitations set forth in the hypothetical, and determines whether the claimant, **in light of the limitations posed in the hypothetical,** is able to perform other work which exists in the national economy. In the instant case, there are two problems with the VE's testimony. First, it was given in response to a vocational hypothetical which did not include all of Plaintiff's limitations. Second, the VE's testimony contains critical errors necessitating reversal of the ALJ's decision. As to the first problem, in *Gallant v. Heckler,* 753 F.2d 1450, 1456 (9th Cir. 1984), the Ninth Circuit stated, in relevant part, as follows:

> A vocational expert's testimony in a disability benefits proceeding "is valuable only to the extent that it is supported by medical evidence." *Sample v. Schweiker,* 694 F.2d 639, 643-44 (9th Cir. 1982).
>
> * * *
>
> If the assumptions in the hypothetical are not supported by the record, the opinion of the vocational expert that claimant has a residual working capacity has no evidentiary value.

Accordingly, that aspect of vocational expert Ridenour's testimony which was based on the exclusion of Dr. Cross' opinion, Plaintiff's testimony, the testimony

of Plaintiff's witness, and the Physical Therapy Associate's assessment has no evidentiary value and must be discounted.

The second problem with the VE's testimony is more complicated. As noted in footnote 1, above, the ALJ's finding regarding Plaintiff's physical functional capacity is confusing. It appears to be based on three separate vocational hypotheticals. These three vocational hypotheticals then formed the basis of the ALJ's finding Plaintiff can perform "sedentary work as described on a full-time basis . . . " (Tr. 22).

First, Plaintiff notes that, "as described" in Dr. Brennan's report, plaintiff is restricted to *occasionally* lifting 10-15 pounds. She is not able to *frequently* lift any weight. (See Tr. 255). Further, she is restricted to an unspecified degree from reaching. (Tr. 256).

Second, Plaintiff notes that, "as described" in the physical capacity evaluation performed by Physical Therapy Associates, Plaintiff is *occasionally* able to lift and carry up to 10 pounds but she is unable to *frequently* lift or carry any weight. Further, she is able to *reach* only *occasionally*. (Tr. 291)

The Vocational Expert Testimony Is Inaccurate, Directly Contradicting Information Contained In The DOT And SCO

As discussed below, critical aspects of the vocational testimony are inaccurate and cannot constitute substantial evidence to support the ALJ's decision. The ALJ erred by relying on VE testimony which conflicts with the Secretary's own resources. In determining the skill level

of a claimant's past work, and in evaluating whether the claimant is able to perform other work, the Secretary routinely relies on the *Dictionary of Occupational Titles (DOT)* and its companion volume, *Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles (SCO)*, published by the U.S. Dep't of Labor. *Villa v. Heckler*, 797 F.2d 794, 798 (9th Cir. 1986). See also, 20 C.F.R. §§ 404.1566(d)(1) and 416.966(d)(1). (*DOT* is the Secretary's primary source of reliable job information).

In *Terry v. Sullivan*, 903 F.2d 1273 (9th Cir. 1990), the Ninth Circuit reversed the Secretary's decision, finding the plaintiff's argument particularly persuasive because it relied entirely on the Secretary's own resources – namely the *DOT* and *SCO*. In *Terry*, just as in the instant case, the ALJ has impermissibly relied on vocational testimony which conflicted with the *DOT* and the *SCO*.

As the *Terry* court noted, one feature of the *SCO* is that it assigns to each job a number that reflects its specific vocational preparation (SVP) time – *i.e.*, how long it generally takes to learn the job. (*See Terry*, at 1276). Another feature of the *SCO* is explained in SSR 83-14, in relevant part, as follows:

> **POLICY STATEMENT:** The term "exertional" has the same meaning in the regulations as it has in the United States Department of Labor's publication, the *Dictionary of Occupational Titles* (DOT). In the DOT supplement, *Selected Characteristics of Occupations Defined in the Dictionary of Occupational Titles* (SCO), occupations are classified as sedentary, light, medium, heavy, and very heavy according to the degree of primary strength requirements of the occupations. These

consist of three work positions (standing, walking, and sitting) and four worker movements of objects (lifting, carrying, pushing, and pulling).

* * *

. . . In the SCO, where specific occupations have critical demands for certain physical activities, they are rated for climbing or balancing; stooping, kneeling, crouching or crawling; reaching, handling, fingering, or feeling; talking or hearing; and seeing (bold emphasis added).

(See Plaintiff's Exhibit A, for the complete text of SSR 83-14).

In the instant case, just as in *Terry*, the *SCO* establishes that the vocational expert's testimony is erroneous. Therefore, the Secretary's decision, which is based on that erroneous testimony, must be reversed.

As evidenced above, the VE used the *DOT* as a source to identify titles of occupations Plaintiff purportedly could perform; however, certain aspects of the vocational expert's testimony directly contradict the *DOT* and the *SCO*.

At Appendix C, pages C-1 through C-4 of the *SCO*, the critical physical demand components of jobs are discussed and defined. Of particular relevance to the instant case is the definition of the physical activity of *reaching*, defined as follows on page C-3 of the *SCO* appendix[4]:

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[4] See Plaintiff's Exhibit B for *SCO* Appendix C, pp. 1-4.

8. REACHING

Extending hand(s) and arm(s) in any direction. In Part A, the rating for the Reaching component appears eighth in the first Physical Demand column under the vertical heading **Re.**

As noted above, the ALJ found Plaintiff's residual functional capacity is as described in the referenced exhibits, except that she can engage in sedentary work on a full-time basis. Juxtaposing the ALJ's findings upon the foregoing definition excerpted from the *SCO*, it is apparent that Plaintiff is precluded from performing work which entails more than *occasional* **reaching.** Accordingly, as shown below, Plaintiff is precluded from performing both jobs the VE identified, *i.e.*, food and beverage order clerk and telephone answering service operator.

As noted by the VE, the job of order clerk, food and beverage, is assigned *DOT* classification #269.567-014 and telephone answering service operator is assigned *DOT* classification #235.662-026. (See Plaintiff's Exhibit C, pp 1-2 for the narrative *DOT* descriptions of these jobs). On pages 335 and 338 of the *SCO*, these two jobs are rated according to the extent to which they involve critical physical demands, including *reaching* (**Re**). The frequency which which each physical demand occurs in a given job is designated by a code – N, F, O, or C, defined as follows:

Code	Frequency	Definition
N	Not Present	Activity or condition does not exist.
O	Occasionally	Activity or condition exists up to 1/3 of the time.
F	Frequently	Activity or condition exists from 1/3 to 2/3 of the time.
C	Constantly	Activity or condition exists 2/3 or more of the time.

As page 335 of the *SCO* reveals, the job of food and beverage order clerk requires *frequent* (from 1/3 to 2/3 of the time) **reaching.** (See Plaintiff's Exhibit D, page 1).

As page 338 of the *SCO* reveals, the job of telephone answering service operator requires *constant* (2/3 or more of the time) **reaching.** (See Plaintiff's Exhibit D, page 2).

Based on the *SCO*, both jobs are incompatible with Plaintiff's limitations, as found by the ALJ. The VE's contrary testimony is erroneous, and the ALJ's reliance thereon is reversible error.

CONCLUSION

The decision of the Secretary is not supported by substantial evidence, nor have the proper legal standards been applied. Accordingly, the Secretary's final order

should be reversed and Plaintiff should be found disabled, as alleged.

Respectfully submitted,

/s/ Ralph Wilborn
RALPH WILBORN, OSB #84104
Of Attorneys for Plaintiff

(PPS-105) **SSR 83-14**

PLAINTIFF'S EXHIBIT A

TITLES II AND XVI: CAPABILITY TO DO OTHER WORK – THE MEDICAL – VOCATIONAL RULES AS A FRAMEWORK FOR EVALUATING A COMBINATION OF EXERTIONAL AND NONEXERTIONAL IMPAIRMENTS

PURPOSE: To clarify how the table rules in Appendix 2, Subpart P, Regulations No. 4, provide a framework for decisions concerning persons who have both a severe exertional impairment and a nonexertional limitation or restriction.

CITATIONS (AUTHORITY): Sections 223(d)(2)(A) and 1614(a)(3)(B) of the Social Security Act; Regulations No. 4, Subpart P, sections 404.1505(a), 404.1520(f)(1), 404.1545, 404.1560-404.1569; Appendix 2 of Subpart P, section 200.00(e)(2); and Regulations No. 16, Subpart I, sections 416.905(a), 416.920(f)(1), 416.945, 416.960-416.969.

PERTINENT HISTORY: No table rule applies to direct a conclusion of "Disabled" or "Not disabled" where an individual has a nonexertional limitation or restriction

imposed by a medically determinable impairment. In these situations, the table rules are used, in conjunction with the definitions and discussions provided in the text of the regulations, as a framework for decisionmaking.

This Program Policy Statement (PPS) clarifies the distinction between exertional and nonexertional limitations and explains how the latter affect performance of work activities. The PPS also explains how to evaluate the vocational effects of nonexertional impairments within the context of the exertionally based table rules where claimants or beneficiaries also have severe exertional impairments that limit them to sedentary, light, or medium work.

See the cross-reference section at the end of this PPS for related PPS's, the first one of which contains a glossary of terms used.

POLICY STATEMENT: The term "exertional" has the same meaning in the regulations as it has in the United States Department of Labor's publication, the *Dictionary of Occupational Titles* (DOT). In the DOT supplement, *Selected Characteristics of Occupations Defined in the Dictionary of Occupational Titles* (SCO), occupations are classified as sedentary, light, medium, heavy, and very heavy according to the degree of primary strength requirements of the occupations. These consist of three work positions (standing, walking, and sitting) and four worker movements of objects (lifting, carrying, pushing, and pulling).

Any functional or environmental job requirement which is not exertional is "nonexertional." In the disability programs, a nonexertional impairment is one which is medically determinable and causes a nonexertional limitation

of function or an environmental restriction. Nonexertional impairments may or may not significantly narrow the range of work a person can do. In the SCO, where specific occupations have critical demands for certain physical activities, they are rated for climbing or balancing; stooping, kneeling, crouching or crawling; reaching, handling, fingering, or feeling; talking or hearing; and seeing. Occupations are also rated for certain environmental conditions (e.g., high humidity or excessive dust). With respect to job complexity, occupations are rated by the training time required for average performance. Further, the occupational code numbers assigned to jobs reflect different levels of complexity in dealing with data, people, and objects. Narrative occupational descriptions in the DOT explain what is generally done in the job.

Effects of Nonexertional Impairments

Maintaining body equilibrium; using the fingers and finger tips to work with small objects; using the eyes and ears to see and hear; and using the vocal apparatus to speak are considered nonexertional activities. Limitations of these functions can affect the capacity to perform certain jobs at all levels of physical exertion. An entire range of jobs can be severely compromised. For example, section 201.00(h) of Appendix 2 calls attention to the fact that bilateral manual dexterity is necessary for the performance of substantially all unskilled sedentary occupations.

Mental activities are also nonexertional. Jobs at various levels of complexity require mental functions such as intellectual competence and ability to function in terms of

behavior, affect, thought, memory, orientation and contact with reality. Exposure to particular work stresses may not be medically sustainable for some persons with mental impairments, as would be the case with some persons who have physical impairments (e.g., certain cardiovascular or gastrointestinal disorders). Depending on the nature and extent of a person's mental impairment which does not meet or equal the criteria in the Listing of Impairments, relatively broad or narrow types of work may be precluded (e.g., dealing with a variety of abstract and concrete variables with nonverbal symbolism – a highly skilled level of work – or dealing frequently with members of the public – a particular type of work at any level of complexity). Although mental impairments as such as considered to be nonexertional, some conditions (e.g., depression or a conversion reaction) may also affect a person's exertional capacity.

Working conditions (environmental demands) which a person may not be able to tolerate as a result of an impairment include exposure to extremes of heat or cold, humidity, noise, vibration, hazards, fumes, dust, and toxic conditions. Physical limitation of function may be linked with an environmental restriction (e.g., a respiratory impairment may diminish exertional capacity as well as restrict a person to types of work not requiring exposure to excessive dust or fumes). In other cases, functional ability may not be impaired by an environmental restriction (e.g., a person may be able to do anything so long as he or she is not near dangerous moving machinery, on unprotected elevations, or in contact with certain substances to which he or she is allergic).

After it has been decided that an impaired person can meet the primary strength requirements of sedentary, light, or medium work – sitting, standing, walking, lifting, carrying, pushing, and pulling – a further decision may be required as to how much of this potential occupational base remains, considering certain nonexertional limitations which the person may also have. For example, at all exertional levels, a person must have certain use of the arms and head to grasp, hold, turn, raise, and lower objects. Most sedentary jobs require good use of the hands and fingers. In jobs performed in a seated position which require the operation of pedals or treadles, a person must have the use of his or her legs and feet. Relatively few jobs in the national economy require ascending or descending ladders and scaffolding. Two types of bending must be done frequently (from one-third to two-thirds of the time) in most medium, heavy, and very heavy jobs because of the positions of objects to be lifted, the amounts of weights to be moved, and the required repetitions. They are stooping (bending the body downward and forward by bending the spine at the waist) and crouching (bending the body downward and forward by bending both the legs and spine). However, to perform substantially all of the exertional requirements of most sedentary and light jobs, a person would not need to crouch and would need to stoop only occasionally (from very little up to one-third of the time, depending on the particular job).

For additional discussions of nonexertional impairments, see SSR 83-13, PPS-104, Capability to Do Other Work – The Medical-Vocational Rules as a Framework for Evaluating Solely Nonexertional Impairments.

Evaluating the Claim

Section 200.00(e)(2) of Appendix 2 provides that, "where an individual has an impairment or combination of impairments resulting in both strength limitations and nonexertional limitations, the rules in this subpart are considered in determining first whether a finding of disabled may be possible based on the strength limitations alone and, if not, the rule(s) reflecting the individual's maximum residual strength capabilities, age, education, and work experience provide a frame-work for consideration of how much the individual's work capability is further diminished in terms of any types of jobs that would be contraindicated by the nonexertional limitations. Also, in these combinations of nonexertional and exertional limitations which cannot be wholly determined under the rules in this Appendix 2, full consideration must be given to all of the relevant facts in the case in accordance with the definitions and discussions of each factor in the appropriate sections of the regulations, which will provide insight into the adjudicative weight to be accorded each factor."

Disabled Based on Strength Limitations Alone

Where a person's residual functional capacity (RFC), age, education, and work experience coincide with the criteria of an exertionially based rule in Table No. 1, 2, or 3 – and that rule directs a conclusion of "Disabled" – there is no need to consider the additional effects of a nonexertional impairment since consideration of it would add nothing to the fact of disability. A written determination or decision supporting a conclusion must specify the

rule in Appendix 2 which directs such conclusion. It must also reflect consideration of the individual steps of the sequential evaluation process specified in sections 404.1520 and 416.920 of the regulations. There must also be findings of fact based on the evidence in the individual claim which leads to the conclusion that the individual is not exertionally capable of doing work different from past work, considering the medical and vocational factors. (See SSR 83-11, PPS- 102, Capability to Do Other Work – The Exertionally Based Medical-Vocational Rules Met.)

The Exertionally Based Rules as a Framework for Evaluating Additional Impairments of a Nonexertional Nature

Where a person cannot be found disabled based on strength limitations alone, the rule(s) which corresponds to the person's vocational profile and maximum sustained exertional work capability (Table No. 1, 2, or 3) will be the starting point to evaluate what the person can still do functionally. The rules will also be used to determine how the totality of limitations or restrictions reduces the occupational base of administratively noticed unskilled sedentary, light, or medium jobs.

A particular additional exertional or nonexertional limitation may have very little effect on the range of work remaining that an individual can perform. The person, therefore, comes very close to meeting a table rule which directs a conclusion of "Not disabled." On the other hand, an additional exertional or nonexertional limitation may substantially reduce a range of work to the extent that an individual is very close to meeting a table rule which directs a conclusion of "Disabled."

Use of a vocational resource may be helpful in the evaluation of what appear to be "obvious" types of cases. In more complex situations, the assistance of a vocational resource may be necessary. The publications listed in sections 404.1566 and 416.966 of the regulations will be sufficient for relatively simple issues. In more complex cases, a person or persons with specialized knowledge would be helpful. State agencies may use personnel termed vocational consultants or specialists, or they may purchase the services of vocational evaluation workshops. Vocational experts may testify for this purpose at the hearing and Appeals Council levels. In this PPS, the term vocational specialist (VS) describes all vocational resource personnel.

Examples of Evaluation Involving Combinations of Exertional and Nonexertional Limitations

1. *Sedentary exertion combined with a nonexertional impairment.* Example 1 of section 201.00(h) in Appendix 2 illustrates a limitation to unskilled sedentary work with an additional loss of bilateral manual dexterity that is significant and, thus, warrants a conclusion of "Disabled." (The bulk of unskilled sedentary jobs requires bilateral manual dexterity.) An example of nonexertional impairment which ordinarily has an insignificant effect on a person's ability to work is an allergy to ragweed pollen. Many individuals who have this allergy experience no more discomfort during the ragweed season than someone who has a common cold. However, others are more affected by the condition. Assuming that an individual has

a severe impairment of the low back which limits that person to sedentary work, and that the assessment of RFC also restricts him or her from workplaces which involve exposure to ragweed pollen, the implications for adjustment to sedentary work are relatively clear. Ragweed grows outdoors and its pollen is carried in the air, but the overwhelming majority of sedentary jobs are performed indoors. Therefore, with the possible exclusion of some outdoor sedentary occupations which would require exposure to ragweed pollen, the unskilled sedentary occupational base is not significantly compromised. The decisionmaker may need the assistance of a VS in determining the significance of the remaining occupational based of unskilled sedentary work in more difficult cases.

2. *Light exertion combined with a nonexertional impairment.* The major difference between sedentary and light work is that most light jobs – particularly those at the unskilled level of complexity – require a person to be standing or walking most of the workday. Another important difference is that the frequent lifting or carrying of objects weighing up to 10 pounds (which is required for the full range of light work) implies that the worker is able to do occasional bending of the stooping type; i.e., for no more than one-third of the workday to bend the body downward and forward by bending the spine at the waist. Unlike unskilled sedentary work, many unskilled light jobs do not entail fine use of the fingers. Rather, they require gross use of the hands to grasp, hold, and turn objects. Any limitation on

these functional abilities must be considered very carefully to determine its impact on the size of the remaining occupational base of a person who is otherwise found functionally capable of light work.

Where a person has a visual impairment which is not of Listing severity but causes the person to be a hazard to self and others – usually a constriction of visual fields rather than a loss of acuity – the manifestations of tripping over boxes while walking, inability to detect approaching persons or objects, difficulty in walking up and down stairs, etc., will indicate to the decisionmaker that the remaining occupational base is significantly diminished for light work (and medium work as well).

On the other hand, there are nonexertional limitations or restrictions which have very little or no effect on the unskilled light occupational base. Examples are inability to ascend or descend scaffolding, poles, and ropes; inability to crawl on hands and knees; and inability to use the finger tips to sense the temperature or texture of an object. Environmental restrictions, such as the need to avoid exposure to feathers, would also not significantly affect the potential unskilled light occupational base.

Where nonexertional limitations or restrictions within the light work category are between the examples above, a decisionmaker will often require the assistance of a VS.

3. *Medium exertion combined with a nonexertional impairment.* Most medium jobs, like most

light jobs, require the worker to stand or walk most of the time. Also, as in light work, most unskilled medium jobs require gross use of the hands to grasp, hold, and turn objects rather than use of the fingers for fine movements of small object. Medium work is distinct from the less strenuous levels in the activities needed to accomplish the considerable lifting and carrying involved for the full range of medium work. A maximum of 50 pounds may be lifted at a time, with frequent lifting or carrying of objects weighing up to 25 pounds. (Frequent in this context means from one- third to two-thirds of the workday.) Consequently, to perform the full range of medium work as defined, a person must be able to do both frequent stooping and frequent crouching – bending both the back and the legs – in order to move objects from one level to another or to move the objects near foot level. While individual occupation classified as medium work vary in exertional demands from just above the light work requirements to the full range of medium work, any limitation of these functional abilities must be considered very carefully to determine its impact on the size of the remaining occupational base of a person who is otherwise found capable of medium work.

In jobs at the medium level of exertion, there is more likelihood than in light work that each factors as the ability to ascend or descend ladders and scaffolding, kneel, and

crawl will be a part of the work requirement. However, limitations of these activities would not significantly affect the occupational base.

As in light work, inability to use the finger tips to sense the temperature or texture of an object is an example of a nonexertional limitation which would have very little effect on the potential unskilled medium occupational base. The need to avoid environments which contain objects or substances commonly known not to exist in most workplaces would be an obvious example of a restriction which does not significantly affect the medium occupational base.

Where nonexertional limitations or restrictions within the medium work category are between the examples above, a decisionmaker will often require the assistance of a VS.

The Disability Determination or Decision Based on a Combination of Exertional and Nonexertional Impairments

The usual requirements apply for a clear, persuasive, orderly rationale, reflecting the sequential evaluation process. There must be findings of fact and recitation of the evidence which supports each finding (see SSR 82-56, PPS- 81, The Sequential Evaluation Process). Whenever a vocational resource is used and an individual is found to be not disabled, the determination or decision will include (1) citations of examples of occupations/jobs the person can do functionally and vocationally and (2) a

statement of the incidence of such work in the region in which the individual resides or in several regions of the country.

In reaching judgments as to the sufficiency of the remaining exertional job base (approximately 2,500 unskilled medium, light, and sedentary occupations, approximately 1,600 unskilled light and sedentary occupations, and approximately 200 unskilled sedentary occupations), there are three possible situations to consider:

1. Where it is clear that the additional limitation or restriction has very little effect on the exertional occupational base, the conclusion directed by the appropriate rule in Tables No. 1, 2, or 3 would not be affected.

2. Where it is clear that additional limitations or restrictions have significantly eroded the exertional job base set by the exertional limitations alone, the remaining portion of the job base will guide the decision.

3. Where the adjudicator does not have a clear understanding of the effects of additional limitations on the job base, the services of a VS will be necessary.

EFFECTIVE DATE: Final regulations providing the Medical-Vocational Guidelines were published in the *Federal Register* on November 28, 1978, at 43 FR 55349, effective February 26, 1979. They were rewritten to make them easier to understand and were published on August 20, 1980, at 45 FR 55566. The policies in this PPS also became effective as of February 26, 1979.

CROSS-REFERENCES: Program Operations Manual System, Part 4 (Disability Insurance State Manual Procedures), section DI 2388, A.5.b.; SSR 83-10, PPS- 101, Determining Capability to Do Other Work – The Medical-Vocational Rules of Appendix 2 (with a glossary); SSR 83-11, PPS-102, Capability to Do Other Work – The Exertionally Based Medical-Vocational Rules Met; SSR 83-12, PPS-103, Capability to Do Other Work – The Medical-Vocational Rules as a Framework for Evaluating Exertional Limitations Within a Range of Work or Between Ranges of Work; and SSR 83-13, PPS-104, Capability to Do Other Work – The Medical- Vocational Rules as a Framework for Evaluating Solely Nonexertional Impairments.

PLAINTIFF'S EXHIBIT B

APPENDIX C

Physical Demands

Physical Demand components, as used within the U.S. Employment Service (USES) Occupational Analysis Program, provide a systematic way of describing the physical activities that an occupation requires of a worker.

Within USES, the assessment of physical demands

- is focused primarily on the physical demands of the job – not the physical capacities of the worker;
- provides the means to combine information about many jobs into composite occupational information;

- permits the matching of workers and jobs based upon the workers' capabilities;
- permits the modification of the physical demands of a job to fit the capabilities of disabled workers.

PHYSICAL DEMAND FACTORS AND DEFINITIONS

The Physical Demands of an occupation are described in relationship to twenty different factors.

I. STRENGTH

This factor is defined by one of five levels: Sedentary, Light, Medium, Heavy, and very Heavy. Most jobs require workers to expend energy to some extent. The amount can be affected by a worker's body position and the frequency of the repetition of a task. For instance, a worker in an awkward crouching position may experience as much difficulty exerting five pounds of force as when exerting thirty pounds at waist height while standing. Further, a worker who continuously lifts, pushes, or pulls 15-pound objects or carries them over long distances may exert as much physical effort as when lifting pushing, pulling, or carrying 30-pound objects over short distances on a frequent basis.

To determine Strength Level, analysts review three elements in the physical demands of a job and condense these three elements into a single rating reported as the overall Strength Level of the occupation. The three elements and their subcomponents are defined below:

a. Body Position

Standing: Remaining on one's feet in an upright position at a work station without moving about.

Walking: Moving about on foot.

Sitting: Remaining in a seated position.

b. Weight/Force

Lifting: Raising or lowering an object from one level to another (includes upward pulling).

Carrying: Transporting an object, usually holding it in the hands or arms or on the shoulder.

Pushing: Exerting force upon an object so that the object moves away from the force (includes slapping, striking, kicking, and treadle actions).

Pulling: Exerting force upon an object so that the object moves toward the force (includes jerking).

c. Controls: Hand-Arm and Foot-Leg

Controls entail use of one or both arms or hands (hand-arm) or one or both feet or legs (foot-leg) to move controls on machinery or equipment. Controls include, but are not limited to, buttons, knobs, pedals, levers, and cranks.

Physical Demand factors other than those listed above may affect the Strength Level rating. Analysts consider these factors when they are present and adjust the overall Strength Level rating accordingly.

Sedentary Work

Sedentary Work involves exerting up to 10 pounds of force occasionally or a negligible amount of force frequently to lift, carry, push, pull, or otherwise move objects, including the human body. Sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time. Jobs may be defined as Sedentary when walking and standing are required only occasionally and all other Sedentary criteria are met. In Part A of this publication, occupations rated Sedentary have an S in the strength column.

Light Work

Light Work involves exerting up to 20 pounds of force occasionally, or up to 10 pounds of force frequently, or a negligible amount of force constantly to move objects. Physical demand requirements are in excess of those for Sedentary Work. Even though the weight lifted may be only a negligible amount, a job/occupation is rated Light Work when it requires: (1) walking or standing to a significant degree; (2) sitting most of the time while pushing or pulling arm or leg controls; or (3) working at a production rate pace while constantly pushing or pulling materials even though the weight of the materials is negligible. (The constant stress and strain of maintaining a production rate pace, especially in an industrial setting, can be and is physically demanding of a worker even though the amount of force exerted is negligible.) In Part A of this publication, occupations rated Light have an L in the Strength column.

Medium Work

Medium Work involves exerting 20 to 50 pounds of force occasionally, or 10 to 25 pounds of force frequently, or an amount greater than negligible and up to 10 pounds constantly to move objects. Physical demand requirements are in excess of those for Light Work. In Part A of this publication, occupations rated Medium have an M in the Strength column.

Heavy Work

Heavy Work involves exerting 50 to 100 pounds of force occasionally, or 25 or 50 pounds of force frequently, or 10 to 20 pounds of force constantly to move objects. Physical demand requirements are in excess of those for Medium Work. In Part A of this publication, occupations rated Heavy have an H in the Strength column.

Very Heavy Work

Very Heavy Work involves exerting in excess of 100 pounds of force occasionally, or in excess of 50 pounds of force frequently, or in excess of 20 pounds of force constantly to move objects. Physical demand requirements are in excess of those for Heavy Work. In Part A of this publication, occupations rated Very Heavy have a V in the Strength column.

LIMITS OF WEIGHTS LIFTED/CARRIED OR FORCE EXERTED

Rating	Occasionally	Frequently	Constantly
Sedentary	*–10	*	N/A
Light	*–20	*–10	*
Medium	20–50	10–25	*–10
Heavy	50–100	25–50	10–20
Very Heavy	100 +	50 +	20 +

* = negligible weight: N/A = Not Applicable

In the preceding chart, lifting, pushing, and pulling are expressed in terms of both intensity and duration. Judgments regarding intensity involve consideration of the weight handled, position of the worker's body or the part of the worker's body used in handling weights, and the aid given by helpers or by mechanical equipment. Duration is the total time spent by the worker in carrying out these activities. Carrying most often is expressed in terms of duration, weight carried, and distance carried. This information is summarized in the table on the next page.

The range excludes the lower number and includes the higher number, i.e. the range 10 – 25 excludes 10 (begins at 10 +) and includes 25. Overlapping ranges of * – 10 in the Occasionally column for Sedentary Work and Light Work occupations are differentiated on the basis of the worker's posture and the rate at which work is performed. For example, all Sedentary occupations involve sitting constantly. However, in some occupations workers sit consistently but exert force of an amount or at a frequency rate that exceeds those for Sedentary Work. Such occupations are, therefore, rated at least for Light Work.

ABSENCE OR PRESENCE OF OTHER PHYSICAL DEMAND COMPONENTS

Analysts use the following symbols to indicate the absence or presence (and when present, the frequency of occurrence) of the other nineteen Physical Demand components.

Code	Frequency	Definition
N	Not Present	Activity or condition does not exist.
O	Occasionally	Activity or condition exists up to 1/3 of the time.
F	Frequently	Activity or condition exists from 1/3 to 2/3 of the time.
C	Constantly	Activity or condition exists 2/3 or more of the time.

2. CLIMBING

Ascending or descending ladders, stairs, scaffolding, ramps, poles, and the like, using feet and legs or hands and arms. Body agility is emphasized. In Part A, the rating for the Climbing component appears second in the first Physical Demand column under the vertical heading Cl.

3. BALANCING

Maintaining body equilibrium to prevent falling when walking, standing, crouching, or running on narrow, slippery, or erratically moving surfaces: or maintaining body equilibrium when performing gymnastic feats. In Part A, the rating for the Balancing component appears third in the first Physical Demand column under the vertical heading Ba.

4. STOOPING

Bending body downward and forward by bending spine at the waist, requiring full use of the lower extremities and back muscles. In Part A, the rating for the Stooping component appears fourth in the first Physical Demand column under the vertical heading St.

5. KNEELING

Bending legs at knees to come to rest on knee or knees. In Part A, the rating for the Kneeling component appears fifth in the first Physical Demand column under the vertical heading Kn.

6. CROUCHING

Bending body downward and forward by bending legs and spine. In Part A, the rating for the Crouching component appears sixth in the first Physical Demand column under the vertical heading Co.

7. CRAWLING

Moving about on hands and knees or hands and feet. In Part A, the rating for the Crawling component appears seventh in the first Physical Demand column under the vertical heading Cw.

8. REACHING

Extending hand(s) and arm(s) in any direction. In Part A, the rating for the Reaching component appears eighth in the first Physical Demand column under the vertical heading Re.

9. HANDLING

Seizing, holding, grasping, turning, or otherwise working with hand or hands. Fingers are involved only to the extent that they are an extension of the hand, such as to turn a switch or shift automobile gears. In Part A, the rating for the Handling component appears ninth in the first Physical Demand column under the vertical heading Ha.

10. FINGERING

Picking, pinching, or otherwise working primarily with fingers rather than with the whole hand or arm as in handling. In Part A, the rating for the Fingering component appears tenth (last) in the first Physical Demand column under the vertical heading Fi.

11. FEELING

Perceiving attributes of objects, such as size, shape, temperature, or texture, by touching with skin, particularly that of fingertips. In Part A, the rating for the Feeling component appears first in the second set of Physical Demand ratings under the vertical heading Fe.

12. TALKING

Expressing or exchanging ideas by means of the spoken word to impart oral information to clients or to the public and to convey detailed spoken instructions to other workers accurately, loudly, or quickly. In Part A, the rating for the Talking component appears second in the second set of Physical Demand ratings under the vertical heading Ta.

13. HEARING

Perceiving the nature of sounds by ear. In Part A, the rating for the Hearing component appears third in the second set of Physical Demand ratings under the vertical heading He.

14. TASTING/SMELLING

Distinguishing, with a degree of accuracy, differences or similarities in intensity or quality of flavors or odors, or recognizing particular flavors or odors, using tongue or nose. In Part A, the rating for the Tasting/Smelling component appears fourth in the second set of Physical Demand ratings under the vertical heading TS.

15. NEAR ACUITY

Clarity of vision at 20 inches or less. In Part A, the rating for the Near Acuity component appears fifth in the second set of Physical Demand ratings under the vertical heading NA.

16. FAR ACUITY

Clarity of vision at 20 feet or more. (Note: There is no Physical Demand component for rating clarity of vision in the middle distance of 20 inches to 20 feet.) In Part A, the rating for the Far Acuity component appears sixth in the second set of Physical Demand ratings under the vertical heading FA.

17. DEPTH PERCEPTION

Three-dimensional vision. Ability to judge distances and spatial relationships so as to see objects where and as they actually are. In Part A, the rating for the Depth Perception component appears seventh in the second set of Physical Demand ratings under the vertical heading DP.

18. ACCOMMODATION

Adjustment of lens of eye to bring an object into sharp focus. This factor is required when doing near point work at varying distances from the eye. In Part A, the rating for the Accommodation component appears eighth in the second set of Physical Demand ratings under the vertical heading Ac.

19. COLOR VISION

Ability to identify and distinguish colors. In Part A, the rating for the Color Vision component appears ninth in the second set of Physical Demand ratings under the vertical heading CV.

20. FIELD OF VISION

Observing an area that can be seen up and down or to right or left while eyes are fixed on a given point. In Part A, the rating for the Field of Vision component appears last in the second set of Physical Demand ratings under the vertical heading FV.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

SANDRA K. FORNEY,
Plaintiff,
v.
SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Defendant.

Civil No. 94-6357-JO

OPINION AND ORDER

(Filed May 1, 1995)

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JONES, Judge:

Claimant Sandra Forney seeks judicial review of a final decision of the Secretary of Health and Human Services denying her application for supplemental security income benefits ("SSI") under the Social Security Act.

This Court has jurisdiction to review the Secretary's decision pursuant to 42 U.S.C. § 405(g). Following a careful review of the record, this court concludes that the Secretary's decision is not supported by substantial evidence and must be remanded.

ADMINISTRATIVE HISTORY

Claimant applied for SSI on November 18, 1991, and was initially denied benefits on February 10, 1992. The denial was affirmed on reconsideration. On March 15, 1993, a hearing was held before an Administrative Law Judge ("ALJ"). The ALJ found that claimant was not disabled, and denied her benefits. The Appeals Council granted claimant's request for review and remanded the claim to the ALJ on July 30, 1993.

After the second hearing on April 18, 1994, the ALJ again denied claimant's application for SSI. After the Appeals Council denied review, the ALJ's denial of benefits became the final decision of the Secretary.

STANDARD OF REVIEW

This court must affirm the Secretary's decision if it is based on proper legal standards and the findings are supported by substantial evidence on the record as a whole. "Substantial evidence is such relevant evidence as

a reasonable mind might accept as adequate to support a conclusion." *Tylitzki v. Shalala*, 999 F.2d 1411, 1413 (9th Cir. 1993). The court must weigh "both the evidence that supports and detracts from the Secretary's conclusion." *Martinez v. Heckler*, 807 F.2d 771, 772 (9th Cir. 1986). The Secretary's decision must be upheld if it is a rational interpretation of the evidence, even if there are other possible rational interpretations. *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989).

SUMMARY OF FACTS

At the time of the first hearing, claimant was 46 years old. Claimant attended high school through the tenth grade and later attained her GED in 1977. Her past work history includes positions as a cook, baker, and kitchen manager for a school.

Dr. Cross, claimant's treating physician, first diagnosed the possibility of fibromyalgia on August 11, 1988. Claimant showed signs of improvement and control over the fibromyalgia from the first diagnosis until July 26, 1991. Thereafter, her condition degenerated and Dr. Cross advised her to stop working because of the pain generated by the fibromyalgia.

Upon the advice of her treating physician, claimant quit her job. Claimant alleges that she is disabled due to the fibromyalgia, also known as fibrositis, and low grade depression stemming from her condition.

On November 18, 1991, claimant applied for SSI benefits. Claimant was examined by Dr. William Dudley as part of the disability determination process. Dr. Dudley

concluded that claimant's condition did not preclude all work. Based on Dr. Dudley's findings, the Secretary denied benefits.

On reconsideration, the Secretary again denied claimant's request for disability benefits, based on reports by Dr. Cross and by a clinical psychologist, Dr. Greenough, Ph.D. In his report, Dr. Cross advised that claimant is restricted to a maximum of 15 minutes of standing and 20 minutes of walking. He also limited claimant from lifting more than 15 pounds, or carrying that weight for more than 30 feet. Dr. Cross further concluded that claimant could work for only two hours during an eight hour day. Dr. Greenough diagnosed claimant with adjustment disorder with depression and characteristics of a dependent personality disorder.

At the hearing on January 13, 1993, a psychologist, Dr. Isabelle Moser, Ph.D., and a vocational expert testified as impartial experts. Both concluded from the evidence presented at the hearing that claimant is capable of working with moderate limitations. The vocational expert further testified that claimant cannot return to her past relevant work.

Claimant testified that she lives with her husband in an apartment. She exercises by walking two miles a day and by participating in water aerobics. For social activities, claimant visits with her family. Although claimant is able to do light housekeeping and grocery shopping, her husband performs the heavy work such as major grocery shopping and carrying laundry.

The ALJ concluded that claimant is not disabled and has the residual functional capacity to perform work that

does not involve lifting more than 15 to 20 pounds or walking more than two miles, and that allows her to stand and change position at will. The ALJ doubted claimant's credibility as to the degree of pain she currently suffers.

After claimant appealed the ALJ's decision, the Appeals Council remanded the case for another hearing based upon its conclusion that the evidence did not support the ALJ's assessment of the claimant's residual functional capacity. On remand, the ALJ was instructed to obtain a consultative general medical examination.

The hearing on remand was held on March 15, 1994. Before the hearing, Dr. Nancy Brennan, D.O., examined claimant at the request of Disability Determination Services. Dr. Brennan's assessment of claimant's fibromyalgia was consistent with Dr. Cross's assessment. Both limit claimant's lifting capacity to 15 pounds, and standing or walking to 15-20 minutes without interruption. Dr. Brennan also determined that claimant could sit for six hours without interruption. Dr. Brennan further limited claimant from kneeling, balancing, crouching, or crawling, and from lifting, carrying, reaching over her head, or handling objects heavier than a pound or two for any length of time. Dr. Brennan also noted that claimant should limit activities requiring reaching, pushing, and pulling. Dr. Brennan advised that claimant should avoid surroundings that cause external stress to her system. Finally, Dr. Brennan reported that claimant demonstrates a lapse of concentration and memory.

Claimant, her husband, Dr. Peter Moulton, Ph.D., and a vocational expert testified at the remand hearing.

Claimant's testimony was substantially the same as in the first hearing, but she added that she had difficulty concentrating due to her pain. Her husband confirmed that testimony.

Dr. Moulton testified that claimant has a moderate limitation on daily activities, a slight limitation on social functioning, a high limitation in concentration, persistence or pace, and no limitation of deterioration or decompensation. He further testified that although claimant's impairments seriously limit her ability to function, they do not preclude work. Dr. Moulton also testified that claimant has an adjustment disorder brought on by pain from the fibromyalgia.

Although new evidence was presented at the second hearing, the vocational expert's testimony remained the same. The ALJ posed a hypothetical based on the reports of Dr. Brennan and Dr. Moulton, The vocational expert identified several jobs claimant could perform, such as telephone answering service operator and order clerk.

SUMMARY OF THE ALJ'S FINDINGS

The ALJ employed a five-step "sequential evaluation" process in evaluating claimant's disability.[1] The first step of the process requires the ALJ to determine whether claimant has been engaged in substantial gainful activity since her alleged onset of disability. Applying this criteria, the ALJ found that claimant's unsuccessful attempt to

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[1] 20 C.F.R. § 416.920(a).

work after the onset of her disability was not substantial gainful activity.

Second, the ALJ must determine whether claimant has "severe" impairments which could impose more than a minimal limitation on the claimant's ability to perform basic work activities. Here, the ALJ found claimant to have "severe" impairments.

Third, the ALJ determined that claimant's impairments do not meet or equal any criteria in the Listing of Impairments of the musculoskeletal system because claimant did not provide appropriate physiological or psychological findings according to the listing requirements.

In the fourth step, the ALJ determine that claimant's impairments and consequent limitations prevented her from returning to her past relevant work as a baker, kitchen manager, or cook.

Last, the ALJ applied the Medical-Vocational Guidelines and determined that claimant retained the residual functional capacity for a modified range of light or sedentary unskilled work. Accordingly, the ALJ concluded that claimant is not under a "disability" as defined in the Social Security Act.

DISCUSSION

Claimant advances four arguments challenging the ALJ's findings. Claimant first argues that the ALJ failed to set forth specific and legitimate reasons for rejecting Dr. Cross's findings. Claimant next argues that the ALJ's failure to make specific findings concerning the lack of

credibility in her testimony is reversible error. Third, claimant asserts that the vocational expert's testimony was based on a hypothetical that did not include all of her limitations as described by her treating physician. Finally, claimant argues that the vocational expert's testimony is directly contrary to the *Dictionary of Occupational Titles* and *Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles.*

DISCUSSION

I. The ALJ Properly Based His Conclusion on the Evidence Presented.

In disability cases, the treating physician's opinion is given deference because the treating physician " 'is employed to cure and has a greater opportunity to know and observe the patient as an individual.' " *Magallanes,* 881 F.2d at 751. A treating physician's opinion is not, however, necessarily conclusive "as to either a physical condition or the ultimate issue of disability." *Id.* Indeed, "[t]he ALJ may disregard the treating physician's opinion whether or not that opinion is contradicted." *Id.* This is particularly true where the opinion is " 'brief and conclusionary in form with little in the way of clinical findings to support [its] conclusion.' " *Id.* (citation omitted).

To reject the opinion of a treating physician, the ALJ must make findings setting forth specific, legitimate reasons that are based on substantial evidence in the record. " 'The ALJ can meet this burden by setting out a detailed and thorough summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and making findings.' " *Magallanes,* 881 F.2d at 751, *quoting Cotton*

v. Bowen, 799 F.2d 1403, 1408 (9th Cir. 1986); *see also Winans v. Bowen*, 853 F.2d 643, 647 (9th Cir. 1987).

Claimant testified that she is active for more than two hours a day on a regular basis. That testimony directly contradicted Dr. Cross's report that claimant could work no more than two hours a day. Because of claimant's contradictory testimony, the ALJ rejected Dr. Cross's opinion. The ALJ did not err in rejecting Dr. Cross's report on that basis.

II. The ALJ's Finding that Claimant Lacked Credibility is Substantiated by the Evidence.

Credibility determinations ordinarily are within the province of the ALJ. *See Fair v. Bowen*, 885 F.2d 597, 604 (9th Cir. 1989). However, "once the claimant produces objective medical evidence of an underlying impairment, and adjudicator may not reject a claimant's subjective complaints based solely on a lack of objective evidence to fully corroborate the alleged severity of pain." *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir. 1991). Nonetheless, "an adjudicator may find the claimant's allegations of severity to be not credible [provided that] the adjudicator * * * specifically makes[s] findings which support this conclusion." *Id.* In his findings, the ALJ noted that claimant's testimony was incongruous to her alleged pain:

> She was capable of attention to all questions asked, and her responses were rational, although somewhat evasive. . . . [S]he no longer has headaches, and she has reported improvement in her musculoskeletal pain to her examining and treating physicians, in contrast to her testimony.

The above reasons constitute specific findings and are sufficient to support the ALJ's conclusion that claimant's allegations of back pain were not credible.

III. The ALJ's Hypothetical Questions were not Improper.

The ALJ's hypothetical questions incorporated all of claimant's relevant limitations as presented by Dr. Brennan and Dr. Moulton. As stated above, the ALJ disregarded Dr. Cross's report because of claimant's contradictory testimony. The ALJ was not, therefore, required to incorporate Dr. Cross's findings in the questions posed to the vocational expert. The ALJ's hypothetical questions were not improper.

IV. The Vocational Expert's Testimony is Contrary to Dr. Brennan's Report.

Because claimant proved that her condition prevents a return to her previous occupation, the Secretary has the burden to show that the claimant can engage in substantial gainful work in the economy. *Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993) (citing *Gallant v. Heckler*, 753 F.2d 1450, 1452 (9th Cir. 1984)).

Although Dr. Brennan reported that claimant's ability to reach is impaired, the occupations identified by the vocational expert require frequent or constant reaching.

The ALJ did not reject Dr. Brennan's assessment that claimant's ability to reach is impaired. Consequently, the ALJ's conclusion that claimant was capable of performing other substantial gainful activity was not supported by substantial evidence because he only considered occupations which require movement beyond claimant's limitations. Accordingly, the Secretary has not sustained her burden of showing that claimant can engage in substantial gainful work in the economy, and the case must be remanded.

CONCLUSION

Based on a review of the record, the Secretary did not sustain her burden of proof in step five of the five-step evaluative process in determining whether claimant is entitled to benefits. IT IS ORDERED that this case be REMANDED to the Secretary for further proceedings in accordance with this opinion.

DATED this 28th day of April, 1995.

/s/ Robert E. Jones
ROBERT E. JONES
United States
District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

SANDRA K. FORNEY, Plaintiff(s), v. SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES, Defendant(s).	)	Civil No. 94-6357-JO JUDGMENT (Filed May 24, 1995)

Based on the record,

IT IS ORDERED AND ADJUDGED that this case be remanded to the Secretary for further proceedings.

DATED: May 24, 1995

/s/ Robert E. Jones
ROBERT E. JONES,
U.S. DISTRICT JUDGE

JUDGMENT

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SANDRA K. FORNEY, Plaintiff-Appellant, v SHIRLEY S. CHATER, Secretary, Commissioner, Social Security Administration, Defendant-Appellee.	CA No. 96-35560 DC No. CV-94-06357 ORDER (Filed Oct. 21, 1996)

In addition to their other arguments, the parties should be prepared to address at oral argument the question whether the decision of the district court is sufficiently final to give this court jurisdiction over the appeal. *Compare Gilchrist v. Schwiker*, 645 F.2d 818, 819 (9th Cir. 1981), and *Copeland v. Bowen*, 861 F.2d 536, 538-39 (9th Cir. 1988), *with Stone v. Heckler*, 722 F.2d 464, 467 (9th Cir. 1983).

FOR THE COURT

CATHY A. CATTERSON
CLERK OF COURT

By /s/ Illegible
Deputy Clerk

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SANDRA K. FORNEY, *Plaintiff-Appellant,* v. SHIRLEY S. CHATER, Secretary, Commissioner, Social Security Administration, *Defendant-Appellee.*	No. 95-35560 D.C. No. CV-94-06357-REJ OPINION

Appeal from the United States District Court
For the District of Oregon
Robert E. Jones, District Judge, Presiding

Argued and Submitted
November 8, 1996 – Portland, Oregon

Filed March 4, 1997

Before: William C. Canby, Jr., Pamela Ann Rymer, and Andrew J. Kleinfeld, Circuit Judges.

Opinion by Judge Canby

COUNSEL

Ralph Wilborn, Ralph Wilborn and Etta L. Wilborn, Eugene, Oregon, for the plaintiff-appellant.

Kathryn A. Warma, Assistant Regional Counsel, Social Security Administration, Seattle, Washington, for the defendant-appellee.

OPINION

CANBY, Circuit Judge:

Sandra K. Forney appeals the district court's order that remanded to the Administrative Law Judge ("ALJ") Forney's application for disability benefits under the Social Security Act. A threshold issue is whether Forney, who has prevailed in district court to the extent of winning a remand pursuant to sentence four of 42 U.S.C. § 405(g), may now appeal the district court's ruling to this court. We conclude that she may not, and accordingly dismiss the appeal.

I. Facts

Forney applied for disability benefits in 1991. Her application was denied and she requested a hearing. An administrative law judge (ALJ) held a hearing and denied benefits. The ALJ's decision was reviewed by the Appeals Council, which remanded the matter to the ALJ for a further hearing. The ALJ again denied the claim, and this time the Appeals Council denied review.

Forney then sought review in district court, pursuant to 42 U.S.C. § 405(g). The district court ruled on four of Forney's contentions. First, it held that the ALJ did not err in rejecting the testimony of Forney's treating physician, because it conflicted with Forney's own testimony. Second, the district court upheld the ALJ's discrediting of

Forney's testimony regarding the severity of her pain; the district court stated that the ALJ made specific findings regarding Forney's courtroom appearance and testimony that were sufficient to support the finding. Third, the court held that the hypothetical questions posed to the vocational expert included all of Forney's relevant physical limitations, in light of the permissible disregard of the testimony of her treating physician. Fourth and last, the district court ruled that the vocational expert incorrectly selected as employment available to Forney several occupations that required frequent or constant reaching, when the credited expert testimony was that Forney's capacity to reach was impaired. In consequence of this last ruling, the district court held that the Secretary had failed to sustain her burden of showing that Forney, who could no longer perform her previous work, can engage in substantial work in the economy. The district court then remanded the matter to the Secretary for further proceedings, which will presumably include further inquiry into whether there are any occupations that Forney, with her impaired reaching ability, can engage in.

II. Appealability

Forney now appeals, seeking to challenge the district court's first three rulings. The threshold issue is whether Forney may appeal at this time when the district court has ordered a remand under sentence four of § 405(g) that may result in an award of all benefits she claimed. We conclude that she may not.

A few years ago, before the Supreme Court's most recent pronouncements dealing with such remands, we

would have said that the district court's decision was not "final," within the meaning of 28 U.S.C. § 1291, insofar as Forney is concerned. We so held in a similar situation in *Gilcrist v. Schweiker*, 645 F.2d 818, 819 (9th Cir. 1981). In *Gilcrist*, an ALJ had rejected a claim of disability from back pain, in part because the allegations of pain were inconsistent with the ALJ's personal observation of the claimant. The district court remanded the matter to the Secretary for reconsideration in light of the extensive medical history of Gilchrist's efforts to secure relief from pain. We held that this remand "does no more than order clarification of the administrative decision," and provided nothing final for us to review. *Id.* at 819.

Gilcrist was distinguishable from another line of our cases, in which we permitted the *Secretary* to appeal from an order of the district court deciding a separable legal issue and remanding the matter to the administrative agency for further proceedings. The leading example is *Stone v. Heckler*, 722 F.2d 464, 466-68 (9th Cir. 1983). In *Stone*, an ALJ had applied the Secretary's medical-vocational guidelines to find no disability. On review, the district court held that the ALJ could not rely on those guidelines, but would have to make specific factual findings on jobs that the claimant could perform. *Stone*, 722 F.2d at 467. The Secretary appealed, arguing that the district court had applied an improper legal standard that would govern further proceedings and should be subject to immediate appellate review. We held that the district court's decision was "final" and appealable by the Secretary, stating:

> The district court's decision is adverse to the Secretary and, if wrong, would result in a totally wasted proceeding below, from which the Secretary may not be able to appeal. Deciding this legal issue now will promote the least possible waste of judicial resources.

Id. We recognized that numerous other courts, in deciding whether remand orders were appealable, had "especially considered whether a holding of nonappealability would effectively deprive the litigants of an opportunity to obtain review." *Id.*

We have followed *Stone* in other cases where the Secretary or similar administrative official sought to appeal orders remanding for administrative proceedings that would be governed by a separable, arguably incorrect, legal standard incorporated in the remand decision. *See Regents of the Univ. of Calif. v. Heckler*, 771 F.2d 1182, 1187 (9th Cir. 1985) (amended opinion) (Secretary of Health and Human Services may appeal adverse decision remanding for further administrative proceedings; *Kaho v. Ilchert*, 765 F.2d 877, 880-81 (9th Cir. 1985)) (District Director of INS may appeal remand order). The key to all of these decisions is that, if no appeal of the remand order were permitted, the Secretary might later be precluded from any appeal. The principle was best explained in *Chugach Alaska Corp. v. Lujan*, 915 F.2d 454, 457 (9th Cir. 1990). In *Chugach*, we permitted the Secretary of the Interior to appeal a district court decision interpreting the Alaska Native Claims Settlement Act and remanding an affected Native group's boundary dispute to the Interior Board of Land Appeals. In explaining why we would review the statutory interpretation prior to the remand, we said:

> [F]ailing to permit immediate appeal might foreclose review altogether. Should the Secretary lose on remand, there would be no appeal, for the Secretary cannot appeal his own agency's determinations.

Id.; see also United States v. Louisiana-Pacific Corp., 846 F.2d 43, 45 (9th Cir. 1988) (declining to permit United States to appeal remand order when it would have means of securing later review; distinguishing *Stone* where, after remand, "the Secretary would have no right to appeal").

These considerations do not apply, of course, to Forney. If she is denied benefits on remand, nothing prevents her from seeking review of the denial. Moreover, she may prevail in the administrative proceedings on remand and obtain complete relief. Accordingly, we would have been inclined, under our prior analysis, to hold that the district court's remand decision was not "final" as to Forney.

In recent years, however, the Supreme Court has spoken in terms that necessarily modify our former approach to "finality" of remand decisions. In *Sullivan v. Finkelstein*, 496 U.S. 617 (1990), the Court permitted the Secretary to appeal as final a decision remanding a Social Security disability claim for further administrative proceedings. As in our cases just discussed, the Court pointed out that, "should the Secretary on remand undertake the inquiry mandated by the District Court and award benefits, there would be grave doubt, as the Court of Appeals recognized, whether he could appeal his own order." *Id.* at 625.

In discussing the question of finality of district court decisions under § 405(g), however, the Court made clear

that decisions by a district court remanding under the fourth sentence of § 405(g) ended the civil action brought to review the Secretary's initial decision.[1] "The use of the term 'a civil action' suggests that at least in the context of § 405(g), each final decision of the Secretary will be reviewable by a separate piece of litigation." *Id.* at 624-25. The fourth sentence of § 405(g) authorizes the district court "to enter 'a *judgment* affirming, modifying, or reversing the decision of the Secretary, *with or without remanding the cause for a rehearing.*' " *Id.* at 625 (quoting 405(g) (emphasis by the Supreme Court)). Thus, according to the Supreme Court:

> The District Court's remand order was unquestionably a "judgment," as it terminated the civil action challenging the Secretary's final determination that respondent was not entitled to benefits, set aside that determination, and finally decided that the Secretary could not follow his own regulations in considering the disability issue.

Id. In light of this comment that the remand order terminates the civil action, we cannot very well conclude that

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[1] Remands are also authorized by the sixth sentence of § 405(g), and those remands do not necessarily terminate the civil action. The sixth sentence authorizes remands only when the Commissioner so moves before filing an answer, or when there is a showing of new material evidence and good cause for not earlier placing it in the record. Neither of these conditions is met in the present case. Forney's remand order therefore falls under the fourth sentence of 405(g). *See Finkelstein*, 496 U.S. at 626; *Shalala v. Schaefer*, 113 S.Ct. 2625, 2629 & n.2 (1993).

the decision in our case is not final for Forney as well as for the Commissioner.[2]

The fact remains, however, that Forney possibly may obtain all of the relief she seeks in the administrative proceedings on remand. The considerations of judicial economy that, before *Finkelstein*, led us to hold remands generally non-final are still present. There is a temptation, accordingly, to resist the conclusion that *Finkelstein* makes a sentence-four remand final for the claimant as well as the Secretary. After all, the Court in *Finkelstein* stated that it was not making a rule for all remands: "There is, of course, a great variety of remands, reflecting in turn the variety of ways in which agency action may be challenged in the district courts and the possible outcomes of such challenges." *Id.* at 623 (footnote omitted). The Court was only ruling on "whether orders of the type entered by the district court are immediately appealable *by the Secretary.*" *Id.* And all but one[3] of the published decisions of the courts of appeals applying *Finkelstein* involve instances in which the Secretary or comparable agency official is allowed to appeal because, if the remand results in victory for the claimant, the Secretary will be unable to appeal. *See, e.g., St. Francis Medical Ctr. v. Sullivan*, 962 F.2d 1110, 1114 (3d Cir. 1992); *Colvin v. Sullivan*, 939 F.2d 153, 155 (4th Cir. 1991); *Travis v. Sullivan*, 985 F.2d 919, 922-23 (7th Cir. 1993); *Baca-Prieto v. Guigni*, 95 F.3d 1006, 1009 (10th Cir. 1996).

[2] It makes no difference that the district court, in remanding, purported not to enter a judgment. The sentence-four remand order *is* a final judgment, whether or not denominated as such. *Shalala*, 113 S.Ct. at 2632 & n.6.

[3] For the one exception, see note 6, *infra*.

In the end, however, it is apparent that to conclude that a sentence-four remand is not final for the claimant is analytically untidy; it is flatly inconsistent with the Supreme Court's insistence in *Finkelstein* that a sentence-four remand terminates the civil action. Indeed, it is error for the district court to attempt to retain jurisdiction upon making a sentence-four remand. *See Shalala*, 113 S.Ct. at 2630. Thus the Fifth Circuit has interpreted *Finkelstein* to preclude a claimant who has been denied benefits administratively after a sentence-four remand from reinstating her district court action to secure further review. *Frizzell v. Sullivan*, 937 F.2d 254, 256-57 (5th Cir. 1991). In order to contest the post-remand denial of benefits, the claimant must institute a new action. *See id.* at 255. The civil action ending in a sentence-four remand, therefore, must be "final," in a formalistic sense, for all parties to it.[4]

That fact, however, does not necessarily entitle Forney to appeal the district court's decision. A prevailing party normally may not appeal the decision in its favor. *See Electrical Fittings Corp. v. Thomas & Betts Corp.*, 307 U.S. 241, 242 (1939) ("A party may not appeal from a judgment or decree in his favor, for the purpose of obtaining review of findings he deems erroneous which

[4] Although the language of § 405(g) and *Finkelstein*, 496 U.S. at 624-25, clearly support the notion that a claimant who has secured a sentence-four remand and then been denied benefits must bring a new action to contest the denial, the advantages of such a system do not spring readily to mind.

are not necessary to support the decree"); *United States v. Good Samaritan Church*, 29 F.3d 487, 488 (9th Cir. 1994) (following *Electrical Fittings*). There can be little doubt that a claimant "prevails" in the view of the Supreme Court when he or she succeeds in securing a sentence-four remand that may result in an award of all of the benefits claimed.[5] The Court so held for purposes of attorney's fee awards in *Shalala*, 113 S.Ct. at 2631.

It is true that the status of prevailing party for purposes of attorney's fees under 28 U.S.C. § 2412(d)(1)(B) does not automatically equate with status as prevailing party for purposes of appeal. There are compelling reasons, however, for declining to permit a claimant in Forney's position from appealing the remand order she succeeded in obtaining. They are the same reasons that underlay the long-established general rule that a remand to an administrative agency was not appealable, with an exception only for the Secretary who might be precluded from post-remand access to the court. *See, e.g., Perales v. Sullivan*, 948 F.2d 1348, 1353 (2d Cir. 1991); *Travelstead v. Derwinski*, 978 F.2d 1244, 1247 (Fed.Cir. 1992). Forney may, on remand, secure all of the relief she seeks. If she

[5] As the Supreme Court recognized in *Finkelstein*, there may be instances when a claimant is foreclosed by the district court's remand decision from part of the benefits sought, and would then seek an appeal from the remand decision on the ground that broader relief should have been awarded. *See Finkelstein*, 496 U.S. at 623 n.3. Like the Supreme Court, we express no opinion on the right of the claimant to immediate appeal in that situation. *See id.* Implicit in this disclaimer, however, is the proposition that when the remand order does *not* foreclose the possibility of the claimant's obtaining all of the relief sought, it is not appealable by the prevailing claimant.

does, our decision on the merits of this appeal will have been wholly unnecessary. Review at this point would be subject to all of the disadvantages of piecemeal appeals; unnecessary decisions waste judicial effort, interfere unduly with the district courts or administrative agencies, and require us to adjudicate on less than a full record. *See Travelstead*, 978 F.2d at 1247. All of these considerations lead us to conclude that we ought not to entertain Forney's present appeal.[6]

Forney argues, however, that our analysis leaves her in considerable danger. She is the prevailing party in her civil action that resulted in a remand. Yet on some of the issues she urged, the district court ruled against her. If she is denied benefits on remand, she must seek review by commencing a new civil action. *See Finkelstein*, 496 U.S. at 625 ("each final decision of the Secretary will be reviewable by a separate piece of litigation"); *Frizzell*, 937

[6] We do not follow, therefore, the example of the Tenth Circuit in *Nguyen v. Shalala*, 43 F.3d 1400 (10th Cir. 1994). There the court of appeals permitted a claimant to appeal a sentence-four remand order, stating in a footnote that such remand orders were "final and appealable" under *Finkelstein*. *Id.* at 1402 n.2. We have found no other published decision permitting appeal of such a remand order by a claimant. The outcome of the claimant's appeal was most unusual; the remand order, which had been invited by the Secretary, was held to be improper and the Secretary's denial of benefits was ordered reinstated. *Id.* at 1403-04. Thus the only party that appealed, the claimant, was left worse off for having appealed. We conclude that this scenario is unlikely to be repeated, and that appeal of a remand order by a claimant normally will leave further administrative proceedings to follow regardless of the outcome of the appeal. For that reason, judicial economy militates against permitting the prevailing claimant to appeal.

F.2d at 255. In that new action, she contends, she is likely to be foreclosed by principles of res judicata, collateral estoppel, or even *stare decisis* from contesting the court's adverse rulings in the prior action. Thus, she contends, she must be allowed to appeal those issues now or forever lose her right to contest them.

Although Forney's argument has some initial appeal, her dilemma is a false one. It is not surprising or unfair that, should Forney return to district court after being denied benefits on remand, the district court likely will adhere to its prior rulings. Even if the district court's remand had not been final, as *Finkelstein* requires it to be, the district court presumably would adhere to the law of the case and not reexamine its earlier rulings. The crucial question for Forney arises when she appeals to this court the adverse decision of the district court in her new civil action. Will she be foreclosed by principles of res judicata or collateral estoppel from litigating the issues decided against her in her first, final civil action, in which she "prevailed"?

The answer is "no." In the first place, it is inappropriate to hold Forney to rulings that she was precluded from appealing. In *Luben Industries, Inc. v. United States*, 707 F.2d 1037, 1040 (9th Cir. 1983), we upheld a district court's refusal to hold the government collaterally estopped by an interlocutory ruling that it could not have appealed. *See also United States v. Weems*, 49 F.3d 528, 533 (9th Cir. 1995) (principle that government should not be bound by ruling it could not appeal inapplicable when opposing party appealed and government was able to litigate issue on cross-appeal).

Second, collateral estoppel applies only to rulings that were essential to the judgment in the prior case. *Id.* at 532. The judgment that Forney has just secured is a sentence-four remand to the Secretary. The district court's rulings against Forney on the issues of rejection of physician's testimony, discrediting of Forney's pain testimony, and inclusion of Forney's physical limitations in the expert's hypothetical questions, were all unnecessary to the remand. The remand was based solely on the error of the vocational expert in testifying that Forney could perform occupations requiring frequent or constant reaching. Thus Forney's case falls squarely within the *Restatement* example that we quoted approvingly in *Weems*, 49 F.3d at 533:

> A, as owner of a trademark, brings an action against B for infringement. B denies the validity of the trademark and denies infringement. The court finds that the trademark is valid, but that B had not infringed it, and gives judgment for B. Thereafter A brings an action against B alleging that since the rendition of judgment B infringed the trademark. B is not precluded from defending this action on the ground that the trademark is invalid.

Restatement Second of Judgments, § 27, comment h, Illustration 14, "Determinations Not Essential to Judgment" (1982). Thus Forney will not be bound in a future appeal by the adverse rulings that we do not permit her to appeal today.

III. Conclusion

Forney prevailed in district court by securing a remand to the Secretary pursuant to sentence four of 42 U.S.C. § 405(g). The remand order terminated her civil action favorably to her, and she is the prevailing party. As a prevailing party, she cannot appeal the remand order. Accordingly, Forney's appeal is

DISMISSED.

Supreme Court of the United States

No. 97-5737

Sandra K. Forney,

Petitioner

v.

Kenneth S. Apfel,
Commissioner of Social Security

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, February 27, 1998. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 27, 1998. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, April 13, 1998. Rule 29.2 does not apply.

January 16, 1998